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United States

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for the Fourth Circuit

See also:
90-6105

Counsel for petitioner: DiTrapano,Rudolph L.

Counsel for respondent: Solicitor General

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2	Jun 5 1990		Appendix of petitioner filed.
4	Jul 10 1990		Order extending time to file response to petition until August 8, 1990.
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6	Aug 20 1990		Brief of respondent United States in opposition filed.
7	Aug 29 1990		DISTRIBUTED. September 24, 1990
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11	Nov 15 1990		Brief of petitioner Robert McCormick filed.
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13	Nov 27 1990		CIRCULATED.
14	Dec 19 1990	X	Brief of respondent filed.
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PETITION FOR WRIT OF CERTIORARI

89-1918

(1)

Supreme Court, U.S.
FILED
JUN 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

ROBERT L. McCORMICK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RUDOLPH L. DITRAPANO
Counsel of Record
di Trapano & Jackson
604 Virginia Street, East
Charleston, West Virginia 25301
(304) 342-0133

REBECCA A. BAITTY
di Trapano & Jackson
604 Virginia Street, East
Charleston, West Virginia 25301

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I. MAY AN ELECTED PUBLIC OFFICIAL BE CONVICTED OF EXTORTION UNDER COLOR OF OFFICIAL RIGHT, BASED UPON AN UNREPORTED CASH CAMPAIGN CONTRIBUTION WHICH WAS NOT COERCED AND WHICH DID NOT CONSTITUTE A *QUID PRO QUO* FOR ANY OFFICIAL CONDUCT?

II. MAY AN ELECTED PUBLIC OFFICIAL BE CONVICTED OF FILING A FALSE TAX RETURN FOR FAILURE TO INCLUDE AN UNREPORTED CASH CAMPAIGN CONTRIBUTION WHICH WAS NOT COERCED AND WHICH DID NOT REPRESENT A *QUID PRO QUO* FOR ANY OFFICIAL CONDUCT, AND WHICH CONSTITUTED REIMBURSEMENT OF PERSONAL FUNDS THE CANDIDATE HAD EXPENDED FOR ELECTION EXPENSES?

III. IS THE STANDARD ANNOUNCED IN FOURTH CIRCUIT'S OPINION IN THIS CASE, WHICH PERMITS THE JURY TO DETERMINE THAT A CAMPAIGN CONTRIBUTION WAS "ILLEGITIMATE", AND THUS SUBJECT TO PROSECUTION UNDER THE HOBBS ACT AND THE INTERNAL REVENUE CODE, BUT CONTAINS NO REASONABLY DEFINITE STANDARD BY WHICH THE LEGITIMACY OF THE CONTRIBUTION SHOULD BE JUDGED, IMPERMISSIBLY VAGUE?

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REPORT OF OPINION OF 4TH CIRCUIT

The opinion of the United States Court of Appeals for the Fourth Circuit, affirming Mr. McCormick's conviction, is reported at 896 F.2d 61 (1990).

JURISDICTIONAL STATEMENT

Petitioner McCormick was indicted and convicted of offenses under 18 U.S.C. § 1951 (The Hobbs Act) and 26 U.S.C. § 7206(1). His conviction was affirmed by the United States Court of Appeals for the Fourth Circuit on February 12, 1990. The Fourth Circuit denied Mr. McCormick's Petition for Rehearing on March 7, 1990. This Court's jurisdiction to review the Court of Appeals' decision is conferred by 28 U.S.C. § 1254(1).

TEXT OF STATUTES INVOLVED

18 U.S.C. § 1951 (The Hobbs Act)

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section--

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

26 U.S.C. § 7206(1)

§ 7206. Fraud and false statements

Any person who --

(1) Declaration under penalties of perjury.-- Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; ...

. . .

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

THE PROCEEDINGS BELOW

Petitioner Robert L. McCormick, a member of the West Virginia House of Delegates who had long been a leading advocate of legislation to allow foreign medical school graduates to practice in underserved areas of the state without meeting full licensing requirements, was convicted of extortion "under color of official right" in violation of the Hobbs Act, 18 U.S.C. § 1951, based upon his receipt of a $900 cash campaign contribution from a lobbying organization for such physicians. He also was convicted of filing a false federal income tax return, in violation of 26 U.S.C. § 7206(1), because he failed to report the contribution, and others he allegedly received from the same organization,[1] on his tax return.

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[1] The indictment charged Mr. McCormick with five counts of extortion, based upon five alleged payments to Mr. McCormick from the doctors, the first two occurring on the same day, June 1, 1984, and the remaining ones occurring between November 1, 1984 and

At trial and on appeal, Petitioner argued that, since the government's own theory was that the payments were intended to reimburse Mr. McCormick for expenses he had incurred in his reelection campaign, and there was no evidence that any campaign funds had been converted to personal use, the payments were nontaxable political contributions which need not be reported.

Mr. McCormick's primary defense with respect to the extortion charges was that he was entitled to request campaign contributions, even from persons with an interest in pending legislation, so long as he did not either coerce the potential contributors, or solicit a contribution as a *quid pro quo* for his official

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May 15, 1985.

The final count of the indictment charged Mr. McCormick with filing a false tax return, in violation of 26 U.S.C. § 7206(1), by failing to report as income the four payments he allegedly received in 1984.

The jury convicted Petitioner of the first extortion charge, and of the tax charge, but failed to reach a verdict on the other extortion counts.

action. This defense was effectively nullified by the District Court's instructions to the jury, which informed them that neither element was required to convict.[2]

Mr. McCormick was fined fifty thousand dollars ($50,000.00), plus nine hundred dollars ($900.00) restitution and costs, plus a three year suspended sentence and probation.

On appeal to the Fourth Circuit Court of Appeals, Mr. McCormick argued that, in order to convict an elected official of extortion for solicitation of campaign contributions, the government should be

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[2] Following approximately two hours of deliberation, the jury asked that the instructions be read again, "with particular emphasis on the definition of extortion under the color of official right and on the law as regards the portion of moneys received that does not have to be reported as income" [Tr. Vol. 8, p. 1219].

Five hours after a modified version of the pertinent instructions was read [Tr. Vol. 8, pp. 1236-51], the jury informed the court that it had reached agreement on one count, but was "at an impasse on the other five" [Tr. Vol. 8, p. 1253]. The district court instructed the jury to continue deliberations, and delivered a modified *Allen* charge the following morning [Tr. Vol. 9, pp. 1259-61]. After deliberating for an additional four hours on the second day, the jury announced that it had reached a verdict on a second count, but appeared deadlocked on the remaining four [Tr. Vol. 9, p. 1262]. Following another two hours of deliberation, the deadlock remained [Tr. Vol. 9, p. 1265].

required to show either actual coercion or that the contribution represented a *quid pro quo* for official action. Since the evidence failed to show either element -- and the jury was specifically instructed that neither coercion nor a *quid pro quo* need be proved -- Mr. McCormick asserted, alternatively, that the evidence was insufficient to support his conviction for extortion or for filing a false tax return, and that the flawed jury instructions required a retrial.

The Court of Appeals ruled that, even in the absence of coercion or a *quid pro quo*, an elected official may be convicted of extorting campaign contributions (and also of failing to report such contributions on his tax return) based almost entirely on evidence that the payments were made in cash and unreported, in violation of state election laws, and thus "not treated as legitimate campaign contributions by either the payor or the official," 896 F.2d 61, 66.

The Court of Appeals specifically held that there

was sufficient evidence to support the convictions, but failed to rule on Petitioner's jury instruction arguments.[3]

STATEMENT OF FACTS

In this case, a veteran state legislator was convicted of extortion and filing a false tax return, based upon his receipt of a nine hundred dollar ($900) cash contribution, four days before an election, from a special interest group whose cause he had prominently supported for years, without any evidence that the payment was coerced or constituted a *quid pro quo*.

Acknowledging "that the facts in this case present a fine distinction," the Fourth Circuit nevertheless upheld the convictions, ruling that by accepting cash contributions and failing to include

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[3] Although the unexplained omission of the jury instruction issue from the Court of Appeal's opinion was raised as grounds for Mr. McCormick's Petition for Rehearing, the Petition was denied without comment.

them on required campaign financing reports,[4] Petitioner had violated the Hobbs Act, regardless of whether the contributions were coerced or represented a *quid pro quo* for some official action.

The historical background of the political contributions at issue in this case was summarized in the Fourth Circuit's opinion:

> McCormick is a member of the West Virginia House of Delegates representing an economically depressed, coal mining region of West Virginia which has long suffered from a shortage of medical personnel. To help alleviate this problem, he has been a leading advocate of legislation to allow foreign medical school graduates to practice in underserved areas of the state without meeting full licensing requirements.
>
> For the past twenty years, foreign medical school graduates who had not met the state medical licensing requirements have been allowed to

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[4] Acceptance of a cash contribution of more than fifty dollars ($50.00) is a misdemeanor under West Virginia's election law, punishable by a fine equal to three times the amount of the contribution. W. Va. Code § 3-8-5d. The willful filing of a "grossly incomplete or inaccurate" campaign disclosure statement also is a misdemeanor, punishable by a fine of not less that five hundred dollars or not more than one year in the county jail, or both. W. Va. Code § 3-8-7.

practice medicine under a "temporary permit" while studying further for the state licensing exams. Some of these persons had been taking and failing the exams for a number of years. During this time they were developing considerable on-the-job experience, and their services were needed in areas of the state such as McCormick's district.

In the 1980s there was a strong movement in the House of Delegates to end this "temporary permit" option. Fearing that this movement jeopardized their careers, several of the temporarily licensed doctors organized themselves, incorporated their group under the name "Coalfield Health Care Association" ("the Association"), and hired a lobbyist, John Vandergrift, to represent them in the state capital. Dr. Ernesto Manual was the leader of this group. In the 1984 West Virginia legislature, the Association and Vandergrift worked for legislation extending the temporary permitting procedures one more year. McCormick sponsored the House version of this proposed legislation which passed on the last day of the regular session of the legislature. Shortly thereafter, Vandergrift discussed with McCormick additional legislation, to be introduced during the 1985 session, providing a permanent solution to the doctors' problem by granting them a permanent medical license as a result of their years of experience. McCormick agreed to sponsor the 1985 legislation.

Mr. McCormick's support for the legislation enabling the foreign doctors to continue practicing was neither surprising nor tentative. The district he represented was almost entirely dependent upon these physicians for medical care.[5] Mr. McCormick had long been a leader in his area's efforts to obtain adequate medical services, both within the community[6] and in the legislature.[7] In fact, the first

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[5] In the United States in 1985, there were 21.4 licensed, practicing physicians for every 10,000 persons. In the state of West Virginia as a whole, even after the influx of foreign trained doctors had doubled the physician population [Gov. Ex. 7, Transcript of Proceedings Before the House of Delegates, West Virginia Legislature, Re: House Bill 1431, 3/13/85], there were only 14.2 physicians for every 10,000 persons [Tr. Vol. 6, pp. 978-87]. And in Mr. McCormick's district, the physician-to-population ratio was only one half that of West Virginia as a whole: 7.4 for every 10,000 persons, *id.*

The only hospital of any significant size in the district was staffed almost entirely by temporarily licensed foreign trained physicians [Tr. Vol. 5, pp. 768-69; Vol. 3, pp. 336-37].

[6] The McCormick family, relatively wealthy business leaders, had donated the money needed to construct an intensive care unit in the local hospital [Tr. Vol. 6, pp. 908-910].

[7] Legislative leaders, as well as board members of the Logan hospital, testified uniformly that Mr. McCormick was the foreign doctors' chief proponent within the Legislature, and that his support for their legislation always was enthusiastic and unequivocal [Tr. Vol. 4, pp. 574-75; Vol. 5, p. 771; Vol. 6, pp. 826-27; Vol. 6, pp. 989-90;

contact between Mr. McCormick and the foreign doctors whose contribution led to his conviction was initiated by the doctors themselves, who recognized Petitioner as their primary advocate in the legislature, with a history of commitment to their cause.

Some months after he had agreed to sponsor the 1985 legislation, Mr. McCormick was back in his district, facing a difficult and expensive primary election challenge. A week before the election, in a telephone conversation with the doctors' lobbyist, John Vandergrift, Mr. McCormick stated:

> that his campaign was rather expensive, the election was coming up, and that he had put out a couple of thousand dollars out of his pocket and he hadn't heard anything from the foreign physicians and he wanted to know what [Vandergrift] was going to do about it [Vol. 2, p. 167-68].

This description of the McCormick-Vandergrift telephone conversation constitutes the *entire* evidence concerning Mr. McCormick's solicitation of the

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Vol. 6, pp. 955-56].

contribution.

Mr. Vandergrift testified that, although Mr. McCormick did not request any particular amount, "he had mentioned that he had just put 2,000 dollars out for campaign expenses in cash, and I thought it would be appropriate at least to replace that and some more if we could raise it" [Tr. Vol. 3, p. 209].

Vandergrift then called Dr. Manual, and "stressed to him I thought it was very important that we get some money to help Bob in his campaign and that if possible, I would like to get 3,000 dollars and I would like to have it in cash" [Tr. Vol. 2, p. 169].

Mr. Vandergrift testified that he believed the doctors should contribute to Petitioner's reelection campaign because he was "[v]ery instrumental. He was the foremost proponent of the foreign doctors and he was very helpful legislatively."

As the Fourth Circuit opinion states:

> On the morning of June 1, 1984, Vandergrift received from Manual an

envelope with nine one-hundred-dollar bills which he delivered to McCormick at his business office. McCormick's receipt of this money constituted [the] basis for the extortion charge on which he was convicted. 896 F.2d at 63-64.

The government's evidence also showed that a second delivery of two thousand dollars in cash was made that same afternoon, although the jury was unable to reach a verdict on this extortion charge. "McCormick neither reported these payments as campaign contributions on the required reporting statements nor listed them on his income tax return." *Id.*

There was also evidence that McCormick received four more cash payments, directly from Dr. Manual, on November 1, November 12, and December 19, 1984, and on May 15, 1985. Dr. Manual testified that these payments were intended as campaign contributions to other supporters of the doctors' cause, who faced general election battles,[8] and the jury also

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[8] Mr. McCormick's only significant opposition, in his overwhelmingly Democratic district, was in the primary election.

failed to reach a verdict on the extortion charges based on these payments.

In March of 1985, the bill sponsored by Mr. McCormick, which allowed experienced physicians to be permanently licensed without attaining the minimum passing score on the licensing exams, was passed by the state House of Delegates, by a vote of 75-24. It also passed the Senate easily, and became law.

The primary evidence relied on by the Fourth Circuit to justify Mr. McCormick's extortion and tax convictions was the manner of making and reporting the contributions:

> For each of these payments, Manual wrote a check on the Association account payable to "Cash," cashed the check, and then placed the cash in envelopes which were personally delivered to McCormick's business office. Although Manual maintained detailed books of the Association's expenditures, the only written records indicating the purpose of these checks were initials or other codes signifying that the funds were for McCormick. Furthermore, McCormick never reported these payments as campaign contributions nor

accounted for them in his campaign's bookkeeping records. 896 F.2d at 64.

However, it was undisputed that Vandergrift himself, without any consultation with Mr. McCormick, had decided to make the June 1 payment in cash.[9] And there was *no evidence whatsoever* that Mr. McCormick knew anything about the Association's bookkeeping methods, for these or any other expenditures.

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[9] Vandergrift testified that he decided to give Mr. McCormick cash, in violation of state law, because McCormick "had mentioned he had to put out cash, I decided to go ahead and replace it in kind" [Tr. Vol. 3, p. 210].

ARGUMENT

There was no suggestion in this case that the June 1, 1984 payment to Mr. McCormick was the product of actual coercion. There also was no evidence that the contribution represented a *quid pro quo*, given in consideration for the defendant's official actions. The evidence was nearly overwhelming that Mr. McCormick's continued support for the foreign doctors' legislation was assured, regardless of any contributions they might or might not make, due to his district's desperate need for their services. And the doctors themselves testified unequivocally and emphatically that they never considered Mr. McCormick's support to be tied to their willingness to contribute to his campaign. [Excerpts from this testimony are reprinted in the Appendix.]

The jury was repeatedly instructed, and the government repeatedly argued, that they did not need to find either coercion or a *quid pro quo* in order to

convict Mr. McCormick. Instead, they were told that they could find him guilty of extortion, and of filing a false tax return by failing to declare the payment, if the money did not constitute a "voluntary" political contribution -- and "voluntary" was repeatedly defined as being limited to one made "without expectation of *some benefit*".

Although the Fourth Circuit's opinion ignores the question of the adequacy of the jury instructions, an issue which was briefed and argued, the Court clearly holds that neither actual coercion nor a *quid pro quo* is required to be proven in an extortion prosecution based upon an elected official's solicitation of political contributions.

The Court of Appeals bases Mr. McCormick's extortion conviction on two factors -- receiving cash contributions, and failing to report them -- which are misdemeanors under state law, and which have no logical connection to the issue of whether the

contributions were "extorted" in violation of federal law.

The Fourth Circuit's opinion represents the first time that a federal Court of Appeals has held that an elected official may be convicted of violating the Hobbs Act based upon his campaign fundraising activities, without evidence of either coercion or a specific *quid pro quo*. This holding conflicts with the opinions of other Circuits as well as with the official policy of the Department of Justice.

As the cases from other Circuits discussed in this Petition emphasize, the First Amendment protections for political fundraising, and the fine line which separates even the most "legitimate" campaign fundraising from bribery or extortion, require a careful drawing and observance of the line of demarcation.

The Fourth Circuit's opinion provides virtually no useful guidance, either for a public official attempting to conform to the law, or for a jury attempting to judge his guilt or innocence.

IN PERMITTING AN ELECTED OFFICIAL TO BE CONVICTED OF EXTORTION FOR RECEIVING A CAMPAIGN CONTRIBUTION, WITHOUT EVIDENCE OF EITHER EXTORTION OR A *QUID PRO QUO*, THE FOURTH CIRCUIT'S OPINION IS IN CONFLICT WITH BETTER REASONED DECISIONS BY OTHER CIRCUITS.

Courts construing the federal extortion and bribery statutes in the context of campaign fundraising have recognized the obvious: *all* political contributions are made with the hope that the political, social or economic interests of the donor will be benefitted.[10]

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[10] A recent publication of the Josephson Institute for the Advancement of Ethics, *Ethics: Easier Said Than Done*, Vol 1, No. 4 (1988) [hereinafter cited as *Josephson*], illustrates the scope of such self-interested 'donating'.

As the cost of campaigning has increased – fund raisers calculate that United States Senate incumbents must raise nearly $10,000 each week for their entire six-year term so they can successfully run again – so has the magnitude of fund raising from special interests. "In 1974 there were 608 Political Action Committees (PACs) contributing a total $12.5 million to congressional candidates. In 1986, a total of 4,157 PACs donating $132.2 million to campaigns." *Josephson*, *supra*, at 30.

In addition, lobbyists for special interest groups spent more than $63 million trying to influence Congress in 1987: National Committee to Preserve Social Security, just under $3 million; Common Cause: $2.56 million; Philip Morris U.S.A.: $2.55 million; The Committee to Protect the Family: $1.85 million; Sierra Club: $1.5 million; National Association of Letter Carriers: $1.48 million; Fiber Fabric and Apparel Coalition for Trade: $1.24 million; Home Recording Rights Coalition: $1.18 million major pro-gun lobbies

All federal Courts of Appeals – and even the United States Department of Justice – have given at least token recognition to the necessity of treating campaign financing as a special category under the Hobbs Act, to avoid penalizing or chilling protected constitutional rights, and to avoid the vagueness problems otherwise inherent in such prosecutions.

> Both judges and commentators have expressed concern over the application of the Hobbs Act to traditional political fundraising. Two courts have rejected vagueness challenges to the Hobbs Act's

application to political fundraising in cases involving explicit *quid pro quo* and coercive demands. Current Justice Department policy calls for prosecution *only in cases where campaign contributions are extorted by*

(National Rifle Association of America, Owners of America, and Citizens' Committee for the Right to Keep and Bear Arms): $1.6 million; Handgun Control, Inc.: $600,000. *Josepheon*, *supra*, at 25.

Political fund raising at the state and local level also is based primarily on the contributors' self interest. For example, the overwhelming majority of campaign contributions to state court judges – whose campaign costs can exceed a million dollars – are from lawyers who practice before them. C. Kelley, *I Gave at the Law Firm: The Ethics of Judicial Campaign Financing*, *Josepheon*, *supra*, at 77 (citing, *inter alia*, Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 23 J.L. and Pol. 57 (1985).

coercion or by "a specific, identifiable quid pro quo." United States Attorneys' Manual, section 9-131.180 [1984]. Thus, prosecutorial discretion is currently being exercised so as to avoid the application of the Hobbs Act extortion proscription to legitimate political fundraising activities.

Fleissner, *Prosecuting Public Officials Under the Hobbs Act: Inducement as an Element of Extortion Under Color of Official Right*, 52 U. Chi. L. Rev. 1066, 1087 n.103 (1985)(emphasis added).

Until the Fourth Circuit's opinion in this case, virtually every federal Court of Appeals opinion affirming a Hobbs Act conviction involving the solicitation of political funds has found either "a specific, identifiable *quid pro quo*" or actual coercion by the public official, or both. *E.g., United States v. Egan*, 860 F.2d 904 (9th Cir. 1988); *United States v. Dozier*, 672 F.2d 531 (5th Cir. 1982); *United States v. Cerilli*, 603 F.2d 415 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980); *United States v. Haimowitz*, 725 F.2d 1561 (11th Cir. 1984); *United States v. Bibby*, 752 F.2d 1116 (6th Cir. 1985).

The Fourth Circuit's opinion acknowledges that

the Second, Third and Fifth Circuits have upheld convictions of elected officials after specifically finding proof of *quid pro quo* exchanges, but asserts that these cases "do not stand for the proposition that such exchanges are required for a conviction under the Hobbs Act" (emphasis in original), 896 F.2d at 66.

However, at least two Circuits -- the Sixth and Eleventh -- have squarely held that such exchanges are required for a Hobbs Act conviction, and the leading cases from the Third, Fifth and Ninth Circuits strongly imply this requirement.

In *United States v. Bibby*, 752 F.2d 1116 (6th Cir. 1985), the Court emphasized that the often repeated statement (which the Fourth Circuit's opinion in this case also invokes) that a public official's acceptance of money violates the Hobbs Act "'so long as the motivation for the payment focuses on the recipient's office' ... cannot be applied literally. Otherwise any political contribution could conceivably

provide the basis for a Hobbs Act charge."

In fashioning a workable definition of extortion in the context of campaign fundraising, the Sixth Circuit expressly held that a *quid pro quo* is an essential element of a Hobbs Act prosecution based upon an elected official's solicitation of campaign contributions:

> What the Hobbs Act proscribes is the taking of money by a public official *in exchange for specific promises to do or refrain from doing specific things. In other words, there must be a quid pro quo.*

United States v. Bibby, *supra*, at 537 (emphasis added) (citations omitted).

The Eleventh Circuit also has required proof of a *quid pro quo* to sustain an elected official's extortion conviction based on fundraising activities. In *United States v. Haimowitz*, 725 F.2d 1561 (11th Cir. 1984), the Court affirmed several extortion convictions of Haimowitz, a lawyer, and Florida state senator Scarborough, based upon a $7500 "legal fee" paid to in return for the senator's promise to intercede with

liquor authorities on Abbot's behalf.

But the Court took a different view of the defendants' Hobbs Act convictions based upon Senator Scarborough's solicitation of a campaign contribution from Haimowitz.[11] It reversed these convictions solely because of the lack of a quid pro quo: "there was no proof that *this demand was coupled with a promise* by Scarborough to perform some act of official grace." *Id.* at 1473, 1477 (emphasis added)(citing *United States v. Dozier, infra.*

This same requirement of a demand coupled

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[11] Both defendants were convicted of extortion under color of official right, based on the following taped conversation between them and Abbott:

> Scarborough: I'm running for re-election by the way.
>
> Haimowitz: Wait a minute, we'll get into that later.
>
> Scarborough: No, no, no, I'll get into this now. I need a thousand dollars from you when I run, in the form of a company check.
>
> Abbott: No problem. I, you got it....

725 F.2d at 1473 n.12.

with a promise or threat of some official action – essentially a *quid pro quo* – was held by the Fifth Circuit to be the critical factor which saved the Hobbs Act from being unconstitutionally vague. In a holding which is acknowledged but not reconciled in the Fourth Circuit's opinion in this case, *United States v. Dozier*, 672 F.2d 531 (5th Cir.) *cert. denied*, 103 S.Ct. 256 (1982), the Fifth Circuit carefully analyzed the difficult issues presented in these cases, and concluded that requiring proof of a *quid pro quo* would cure the vagueness inherent in the Hobbs Act's application to campaign financing activities:

> The Supreme Court has recognized the important function of financial contributions in expressing support for candidates and fueling political debate. *E.g., Buckley v. Valeo*, 424 U.S. 1, 21, 96 S.Ct. 612, 635, 46 L.Ed.2d 659 (1976); *Citizens Against Rent Control v. City of Berkeley*, — U.S. —, — - —, 102 S.Ct. 434, 435-436, 70 L.Ed.2d 492 (1981).
>
> Moreover, as Dozier is quick to point out, commentators and judges have expressed concern lest overzealous but unwitting fundraisers be swept up in

a net originally intended for the truly venal. Criticizing a Second Circuit decision applying the Hobbs Act against a Commissioner of Public Works who had demanded campaign contributions from an engineering firm under contract to his department, one writer has observed:

> (I)f a public official who asks for a political contribution from one who does, or may do, business with the government can be prosecuted on proof of those facts alone, then the Hobbs Act has become an extraordinary mechanism for controlling political activity on the state and local levels.... If (*United States v. Trotta*, 525 F.2d 1096 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (96 S.Ct. 2167, 48 L.Ed.2d 794) (1976)) means that a local government official commits extortion by soliciting a contribution from an organization that

> has or might have contacts with his agency, and is thereby liable to be imprisoned for twenty years, one may well ask whether a governor who attends a fundraising dinner and solicits contributions from the businessmen present has committed a felony.

Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 Geo.L.J. 1171, 1196 (1977) (*quoted in United States v. Cerilli*, 603 F.2d 415, 437 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043, 100 S.Ct. 728, 62 L.Ed.2d 728 (1980) (Aldisert, J., dissenting). *See also Williams*, [621 F.2d 123] at 126 [5th Cir.1980] (Tate, J., concurring).

* * *

Despite the reasonableness of these apprehensions, we remain unpersuaded that the Hobbs Act, as previously interpreted by this and other courts, discourages legitimate requests for political contributions. Our need to avoid hampering honest candidates who must solicit funds from prospective supporters does not require that the courts abandon this necessary, if troublesome, realm of political maneuver to those who would abuse its opportunities. A moment's reflection

should enable one to distinguish, at least in the abstract, a legitimate solicitation from the exaction of a fee for a benefit conferred or an injury withheld. *Whether described familiarly as a payoff or with the Latinate precision of quid pro quo, the prohibited exchange is the same: a public official may not demand payment as inducement for the promise to perform (or not to perform) an official act.*

> In practice, of course, the fundraising defense makes detection of impropriety more difficult. Demands for money by an unelected official may constitute extortion per se; the latent power of office ordinarily is sufficient to taint such demands as coercive. *See, e.g., United States v. Hathaway*, 534 F.2d 386, 393 (1st Cir. 1976), *cert. denied*, 429 U.S. 819, 97 S.Ct. 64, 50 L.Ed.2d 79 (1976) (permitting conviction, without proof of duress, of Executive Director of municipal Redevelopment Authority who demanded kickbacks from construction contractors). *Where the accused is or was an elected official authorized under our system to solicit contributions, however, a fine line may seperate a request for support from the sale of a favor.* As a sister court has observed, "*No politician who knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation.*" *United States v. Brewster*, 506 F.2d 62, 81 (D.C.Cir.1974). Consequently, we do not seek to punish every elected official who solicits a monetary contribution that represents the

> donor's
> vague expectation of future benefits. We must, nevertheless, discover and penalize those who, under the guise of requesting "donations," *demand money in return for some act of official grace.* The *demanding of specific contributions in return for specific actions* for which the jury convicted Dozier well exemplifies this type of political misconduct.

United States v. Dozier, supra, 672 F.2d at 537-39 (emphasis added).

In *United States v. Egan*, 860 F.2d 904 (9th Cir. 1988), the Ninth Circuit impliedly required *quid pro quo* evidence in upholding the conviction of a California city councilman who had organized a political action committee and then informed individuals interested in constructing a mobile-home project in the city that contributions to the committee would ensure his support. The conviction was justified, the Court held, by "Egan's promises that, in exchange for the contributions and payments he solicited, he would engineer favorable votes before the city council." *Id.* at 907-08. The Court also held that the jury instructions

properly required that "the jury could not have convicted if it believed that Egan merely accepted funds knowing that the donors intended to influence his behavior. To the contrary, *the jury must have found that Egan promised or threatened official action in order to extract donations.*" *Id.* at 908.

In *United States v. Cerilli*, 603 F.2d 415 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980), the Third Circuit affirmed Hobbs Act convictions of nonelected officials of the Pennsylvania Department of Transportation, who uniformly demanded payment to a party committee fund -- through advance payment of a specified percentage of the total dollar value of each lease -- from equipment lessors doing business with the state. Rejecting the defendants' excuse that the payments were political contributions and that "the solicitation of political contributions is not only lawful, but is protected by the First Amendment," *id.* at 418, the court concluded that their conduct "constituted

extortion regardless of whether the payments went into appellants' pockets or their party's coffers." *Id.* at 420. The court held that "the *coercive* solicitation of political contributions is within the realm of actions that are illegal under the Hobbs Act," *id.* at 421 (emphasis added), and also emphasized that the defendants' actions were tantamount to an ordinary *quid pro quo*: "(T)he defendants required that payments be made as condition to the lessor's equipment being used." *Id.* at 418.

Other courts also have based their Hobbs Act affirmances upon a finding of actual coercion or a "specific, identifiable *quid pro quo*." *United States v. Wright*, 588 F.2d 31 (2d Cir.), *cert. denied*, 99 S. Ct. 1236 (1979) (contribution in exchange for school board member's signing of letter of intent promising future purchases from donor book marketing agent, with simultaneous exchange of check and letter); *United States v. Mazzei*, 521 F.2d 639 (3d Cir.), *cert. denied*,

423 U.S. 1014 (1975) (state legislator demanded kickbacks, payable to a "Senate Finance Re-election Committee" from a business that leased office space to the state); *United States v. Jarabek*, 726 F.2d 889 (1st Cir. 1984) (affirming conviction of elected member of School Committee & chairman of building subcommittee, who solicited campaign contributions in express return for overlooking nonconforming work on school project). *See also United States v. Trotta*, 525 F.2d 1096, 1100 (2d Cir.1975), *cert. denied*, 425 U.S. 971 (1976) (reversing dismissal of indictment alleging "demand" for payments without specified *quid pro quo*, because "the pressure exerted by Trotta by means of the power of his public office to induce the payment of money is, in itself, the misuse of the office")[12].

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[12] In *United States v. O'Grady*, 742 F.2d 682 (2d Cir. 1984) *(en banc)*, the Second Circuit, sitting en banc, reversed the conviction of a government quality control superintendent under jury instructions allowing conviction for "mere receipt" of over $30,000 in gifts and travel from contractors, and offered its own analysis of *Trotta*:

> The government mistakenly relies on *United States v. Trotta*, 525 F.2d 1096 (2d Cir. 1975), *cert. denied*, 425 U.S. 971, 96 S. Ct. 2167, 48 L. Ed. 2d 794

The concern reflected in these cases, which emphasize the existence of a *quid pro quo* or actual coercion in affirming Hobbs Act convictions of elected officials, centers on the vagueness inherent in a rule which criminalizes campaign fundraising whenever the donor's motivation focuses on the candidate's office or the donor anticipates some type of benefit as a result of the contribution. And as the *Dozier* Court cautioned, an even "stricter insistence upon clarity is necessary whenever a criminal statute's 'margin' may fade into areas protected by the First Amendment," such as political fundraising. *Id.*, 672 F.2d at 539.

> (1976), where we reasoned that an "indictment is (not) defective because of its failure to allege 'a specifically identifiable misuse of office,' in which (the public official) engaged, as an unlawful *quid pro quo* or a consideration in the nature of official action running from (the public official) to (the victim) in return for the payment of the money not lawfully owed." *Id.* at 1100. However, the indictment in Trotta did allege that the public official *demanded* and obtained cash to which neither he nor his office was entitled. That demand, coupled with the power of his public office, was a sufficient allegation of extortion.

742 F.2d at 690 (emphasis added).

Even the official policy of the Department of Justice rejects the rule adopted by the Fourth Circuit, and instead provides that "*a campaign contribution will only be considered induced under color of official right where it corresponds to a specific, identifiable quid pro quo.*" 9 Department of Justice Manual 9-2401 (1988 Supp.) (emphasis added).[13]

Contrary to the Fourth Circuit's suggestion, a requirement that a Hobbs Act conviction based upon

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[13] The Department of Justice policy purports to observe a strict distinction between solicitations of campaign contributions and all other activities by which public officials "induce" citizens to part with their valuables:

> In two decisions, strongly expressed *and reasonable* concerns have been raised regarding the difficult distinction between legitimate campaign contributions and those induced under color of official right. *See United States v. Williams*, F. Supp. (E.D. La. 1979), and *United States v. Cerelli*, 603 F.2d 415 (3d Cir. 1979)(J. Aldisert, dissenting). Prudential considerations now warrant a Division policy that *a campaign contribution will only be considered induced under color of official right where it corresponds to a specific, identifiable quid pro quo. Cf. United States v. Trotta*, 525 F.2d 1096 (2d Cir.), *cert. denied*, 425 U.S. 971 (1976).

9 Department of Justice Manual 9-2401 (1988 Supp.) (emphasis added).

campaign fundraising activities be based upon proof of either actual coercion or a specific *quid pro quo* would not hold elected officials to a lesser standard of conduct than non-elected officials, but would simply recognize the fundamentally different circumstances which govern the conduct of these two classes of officials. As the *Dozier* Court recognized, non-elected officials have no legitimate reason to request money from persons over whom they exercise some official power; it therefore is not unreasonable to presume that solicitation of such payments constitutes a *per se* coercive use of their office. Elected officials, by contrast, have an unquestioned right to solicit money in order to finance their campaigns. The question of when these solicitations cross the "fine line" and become coercive misuse of the candidate's office is much more difficult than in the case of non-elected officials. The requirement of a *quid pro quo* provides an essential degree of definitiveness to this issue, by a

rule of law rather than at the discretion of a prosecutor.

Finally, a *quid pro quo* requirement would not enable elected officials to "avoid the Hobbs Act merely by calling the money 'campaign contributions,'" as the Fourth Circuit asserts. 896 F.2d at 66. Elected officials could still be convicted under the statute if the "contributions" were the product of actual coercion -- which has never been alleged in this case -- or if the evidence established that the official "conditioned performance of official acts on the payment of fees in the name of contributions." *Dozier, supra*, at 538. This rule would offer no immunity to "those who, under the guise of requesting 'donations,' demand money in return for some act of official grace." *Id.*

A ruling requiring coercion of a *quid pro quo* in order to convict an elected official of extortionate fundraising would provide a much needed bright line enabling such officials -- and juries -- to determine when such conduct becomes a federal felony.

THE STANDARD ESTABLISHED BY THE FOURTH CIRCUIT FOR DETERMINING WHEN THE SOLICITATION OF CAMPAIGN CONTRIBUTIONS BY AN ELECTED OFFICIAL CONSTITUTES EXTORTION IS IMPERMISSIBLY VAGUE.

The Circuit Court's opinion in *Buckley v. Valeo*, referring to the Congressional debate over public financing of federal elections, stresses the difficulty of categorizing campaign contributions as legitimate or illegitimate.

> During the Senate debate, Senator Humphrey ... stated:
>
> > Those of us who run for office can profess that the campaign contributions we received do not in any way control our votes, but I venture to say that not many believe it.
>
> * * *

Senator Russell Long pinned the persuasive problem in these words:

> [W]hen you are talking in terms of large campaign contributions ... the distinction between a campaign contribution and a bribe is almost a hair's line difference.

Buckley v. Valeo, 171 U.S. App. D.C. 172, 519 F.2d 821, 838 (D.C. Cir. 1975)(en banc), *aff'd in part, rev'd in part*, 424 U.S. 63, 96 S. Ct. 612 (1976).

The Fourth Circuit's opinion recognizes that, in any Hobbs Act prosecution, "[t]he line is a fine one between an altogether 'voluntary' payment and the conferring of a benefit on someone who holds a particular public office in fear of retaliation or in expectation of benefit." 896 F.2d at 65 (quoting *United States v. Barber*, 668 F.2d 778, 783 (4th Cir.), *cert. denied*, 459 U.S. 829 (1982). The opinion also seems to recognize the special difficulty "in articulating a standard to distinguish [voluntary] campaign contributions to elected representatives from monies extorted because of the official's position." 896 F.2d at 65. Finally, the Fourth Circuit "acknowledge[s] that the facts in this case present a fine distinction." *Id.* at 65.

In the face of all these fine lines and difficult distinctions, the Court's opinion offers an astonishingly

uncertain standard to distinguish extorted campaign contributions from those which, while they may have been made in violation of state elections laws, do not violate the federal Hobbs Act.

And even this uncertain standard was never made available to the jury in this case, which received confusing and contradictory instructions which provided virtually no guidance on when a political contribution constitutes extortion.[14]

The Fourth Circuit's analysis of this critical issue is relatively brief:

> [W]e now hold that the circumstances surrounding money given to elected officials may be sufficient, without proof of an explicit *quid pro quo* exchange, to prove that the payments were never intended to be legitimate campaign contributions. Receiving such payments violates the Hobbs Act. Some of the circumstances that should be considered
>
> in making this determination include, but are not limited to, (1) whether the money was recorded by the payor as a

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[14] The relevant instructions given to the jury are reprinted in the Appendix at 49.

campaign contribution, (2) whether the money was recorded and reported by the official as a campaign contribution, (3) whether the payment was in cash, (4) whether it was delivered to the official personally or to his campaign, (5) whether the official acted in his official capacity at or near the time of the payment for the benefit of the payor or supported legislation that would benefit the payor, (6) whether the official had supported similar legislation before the time of the payment, and (7) whether the official had directly or indirectly solicited the payor individually for the payment.

> Violations of state election laws, while an appropriate consideration in characterizing the payments, do not create *per se* violations of the Hobbs Act. Careless reporting of otherwise legitimate political contributions should not subject elected officials to prosecution for this serious federal offense, and prosecutors should exercise caution to avoid arbitrary and selective prosecution of elected representatives. But when an official does not intend a payment to be a campaign contribution, a jury should be allowed to infer from the circumstances surrounding the payment that it is in fact a payoff violating the Hobbs Act.

896 F.2d at 66-67.

The Fourth Circuit never indicates what weight should be given to any of these "circumstances." Most importantly, the opinion never decides the ultimate

issue: what precisely must this circumstantial evidence establish? The panel clearly states that the evidence need not prove coercion or a *quid pro quo*, but never explains what it *must* prove.

The assertion that a contribution violates the Hobbs Act if it is not intended to be a "legitimate campaign contribution" merely begs the question. There can be little question that the payments at issue in this case were intended to be "political contributions", *i.e.*, payments made for the purpose of influencing the nomination, election or defeat of a candidate or otherwise influencing the outcome of an election. *E.g.*, W. Va. § 3-8-5c; 2 U.S.C. § 431(e)(1)(quoted in *Buckley v. Valeo*, 424 U.S. 63, 96 S.Ct. 612, 694 (1976)). However, under the Fourth Circuit's ruling, these contributions may lose their "legitimacy" and become Hobbs Act violations simply because the manner of making and reporting them

violated state election laws.[15]

The Fourth Circuit's analysis falls far short of the "clarity [which] is necessary whenever a criminal statute's 'margin' may fade into areas protected by the First Amendment," such as political fundraising. *United States v. Dozier, supra*, 672 F.2d at 539.

Apparently aware that its opinion fails to articulate a standard by which extortionate campaign fundraising can be distinguished from nonextortionate activity, the Court simply cautions prosecutors to "avoid arbitrary and selective prosecution of elected representatives." 896 F.2d at 66-67. However, to paraphrase the Second Circuit's concern over a similar issue under the Hobbs Act (whether passive receipt of payments by non-elected public officials is sufficient to establish a violation),

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[15] In fact, cash contributions were a common, and perfectly legal, method of campaign fundraising in West Virginia until the enactment of W. Va. Code § 3-8-5d in 1976. And, as this Court noted in *Buckley v. Valeo, supra*, violations of state reporting laws are extremely common.

> [t]he fact that ambiguous conduct could be prosecuted under the [Court's holding] raises serious constitutional questions of fair notice and overbreadth and makes a mockery of the principle that criminal statutes must be construed strictly with any ambiguity resolved in favor of lenity. The fact that United States Attorneys are responsible and fair-minded persons offers little comfort here. The evil of selective prosecution is not avoided by the likelihood that de minimis violations will be overlooked. We remain a nation of laws rather than of men.

United States v. O'Grady, 742 F.2d 682, 694 (2nd Cir. 1984)(citations omitted)(en banc).

The Fourth Circuit's holding in this case has extraordinary implications for the electoral process in America. Approval of Robert McCormick's prosecution for extortion, under the evidence contained in this record, confers alarming power upon federal prosecutors to convert state law misdemeanors into serious federal felonies, and to play a large role in determine which of the many competing interests in the political arena will be able to further those interests through political contributions. Such discretion in the

hands of one group -- all political appointees themselves -- is the antithesis of the policies underlying the First and Fifth Amendments.

THE STANDARD ESTABLISHED BY THE FOURTH CIRCUIT FOR DETERMINING WHEN CAMPAIGN CONTRIBUTIONS, NOT CONVERTED TO PERSONAL USE, MUST BE REPORTED AS TAXABLE INCOME, ALSO IS IMPERMISSIBLY VAGUE, AND CONFLICTS WITH INTERNAL REVENUE POLICY.

The Internal Revenue Service has long conceded that "[w]here a political gift is received by an individual or a political organization and it is *held or used* for the purposes intended, i.e., for *present or future expenses* of a political campaign or for some similar purpose, it is not taxable income to the recipient." Rev. Rul. 54-80, 1954-1, C.B. 11-12 (emphasis added) (*superseded by* Rev. Rul. 71-449, 1971-2, C.B. 77). Only if political funds are "diverted from the channel of campaign activities and used by a political candidate for any personal purpose" do they

become taxable income, and then only "for the year in which the funds are so diverted." Rev. Rul. 71-449, 1971-2, C.B. 77.

A candidate may maintain "personal and exclusive control" of political funds he receives without incurring tax liability, so long as he does not actually *use* the funds for a personal, nonpolitical purpose. Rev. Rul. 74-23, 1973, C.B. 17.

The applicable Revenue Procedure makes the broad nontaxability of political contributions even clearer:

> Political funds expended by a political candidate ... will be considered to be used for campaign or similar purposes if they are:
>
> (1) utilized for generally recognized campaign expenses, *regardless of when such expenses were incurred*;
>
> (2) contributed to the national, state or local committee of the candidate's party; or
>
> (3) *used to reimburse the political candidate for out-of-pocket campaign expenses paid by him* during a current

campaign, or, if he is not currently campaigning, during his last previous campaign.

Rev. Proc. 68-19, C.B. 1968-1, 810 (emphasis added).

There was absolutely no evidence in this case that any money given by the Coalfield Health Care Association to Mr. McCormick was "diverted from the channel of campaign activities and used by a political candidate for any personal purpose" -- in 1984 or any other year. Indeed, the evidence compels the conclusion that any contributions received by Mr. McCormick were fully nontaxable throughout 1984.

The evidence presented during the government's own case in chief conclusively establishes that the June 1 payment(s) were "*to reimburse the political candidate for out-of-pocket campaign expenses paid by* him during a current campaign", and therefore not taxable. Rev. Proc. 68-19, C.B. 1968-1, 810 (emphasis added). [Excerpts from this testimony are reprinted in the Appendix at 49.]

In his only conversation with Mr. Vandergrift about the money, in May of 1984, Mr. McCormick stated that "his campaign was rather expensive, the election was coming up, and that he had put out a couple of thousand dollars out of his pocket." Mr. Vandergrift added that "I read the tone of his voice that he wanted a campaign contribution, that he needed it." Vandergrift provided a concise explanation of the purpose of the two contributions he allegedly delivered on June 1, 1984 (the first of which was the basis for Mr. McCormick's extortion charge). According to Mr. Vandergrift, Mr. McCormick "*had mentioned that he had just put 2,000 dollars out for campaign expenses* in cash, and I thought it would be apprc priate at least *to replace that* and some more if we could raise it" [Tr. Vol. 2, pp. 167-68, Vol. 3, pp. 209-10].[16]

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[16] Mr. McCormick's 1984 campaign finance reports showed that he had loaned his campaign three thousand dollars on May 21, 1984 [Gov. Ex. 15, Financial Statement, 5/29/84]. Mr. McCormick's total reported expenditures for the 1984 election totaled $6411.53 [Gov. Ex. 15, Financial Statement, 11/27/84]. His reported contributions, excluding the loan from his personal funds, totaled $3,525.00, according to the government's evidence [Gov. Ex. 15,

In short, under long-standing Internal Revenue Service policies, Mr. McCormick could have done anything he wished with the funds he received on June 1, with no risk of incurring tax liability, since they were reimbursement for political expenditures he had already made.

The Court of Appeals simply found that the June 1 payment of $900 was taxable because the jury found that it constituted extortion. This jury finding, and its affirmance by the Court of Appeals, are direct results of the erroneous standards employed to determine whether the payment actually constituted extortion. The same defects discussed above, in connection with the extortion charges, fatally contaminate the tax conviction.

Financial Statements].

CONCLUSION

Other Circuit Courts of Appeals, as well as the Department of Justice's official policy, have adopted a bright line to define when campaign fundraising by an elected official should be condemned as extortion. The Fourth Circuit's opinion rejects that bright line, and substitutes a nearly invisible one.

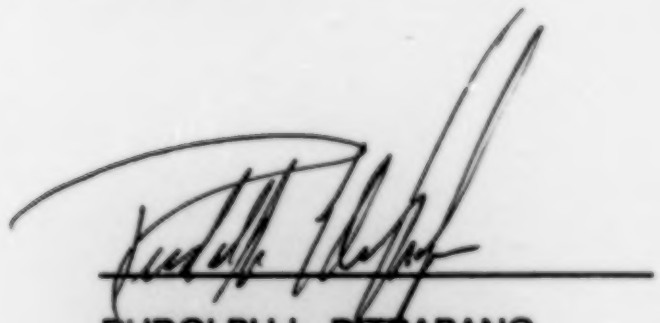
The issue in the Fourth Circuit's opinion is of broad significance, affecting all candidates for public office on the federal, state and local levels, and is appropriate for this Court's consideration.

Petitioner respectfully requests this Court to grant a Writ of Certiorari to the United States Court of

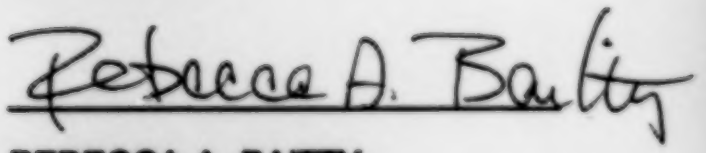
Appeals for the Fourth Circuit, to examine that Court's unprecedented and dangerous ruling.

ROBERT L. MCCORMICK

By Counsel



RUDOLPH L. DITRAPANO
Counsel of Record
di Trapano & Jackson
604 Virginia Street, East
Charleston, W. Va. 25301
(304) 342-0133



REBECCA A. BAITTY
di Trapano & Jackson
604 Virginia Street, East
Charleston, W. Va. 25301

APPENDIX

89-1918

(2)

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JUN 5 1990
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CLERK

NO. _____

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

ROBERT L. McCORMICK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

RUDOLPH L. DITRAPANO
Counsel of Record
di Trapano & Jackson
604 Virginia Street, East
Charleston, West Virginia 25301
(304) 342-0133

REBECCA A. BAITTY
di Trapano & Jackson
604 Virginia Street, East
Charleston, West Virginia 25301

Counsel for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-5702

UNITED STATES OF AMERICA

Plaintiff - Appellee

versus

ROBERT L. MCCORMICK

Defendant - Appellant

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. John T. Copenhaver, Jr., District Judge. (CR-88-220)

Argued: October 6, 1989 Decided: February 12, 1990

Before ERVIN, Chief Judge, CHAPMAN, Circuit Judge, and WILLIAMS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Rebecca Ann Baitty (Rudolph L. DiTrapano, DITRAPANO & JACKSON, on brief) for Appellant. Michael Warren Carey, United States Attorney (Nancy C. Hill, Assistant United States Attorney; Larry R. Ellis, Assistant United States Attorney; Jacquelyn I. Custer, Special Assistant United States Attorney, on brief) for Appellee.

ERVIN, Chief Judge:

Robert L. McCormick appeals his conviction for extortion under color of official right in violation of the Hobbs Act, 18 U.S.C. § 1951, and for filing false income tax returns in violation of 26 U.S.C. § 7206(a). On appeal, McCormick asserts that the payments he received were campaign contributions and that, therefore, the evidence did not support the jury's verdict. He further contends that the government's references to alleged violations of state campaign reporting laws and to his receipt of benefits from a lobbyist denied him a fair trial. For the reasons discussed below, we affirm the judgments of conviction of the defendant.

I.

McCormick is a member of the West Virginia House of Delegates representing an economically depressed, coal mining region of West Virginia which

has long suffered from a shortage of medical personnel. To help alleviate this problem, he has been a leading advocate of legislation to allow foreign medical school graduates to practice in underserved areas of the state without meeting full licensing requirements.

For the past twenty years, foreign medical school graduates who had not met the state medical licensing requirements have been allowed to practice medicine under a "temporary permit" while studying further for the state licensing exams. Some of these persons had been taking and failing the exams for a number of years. During this time they were developing considerable on-the-job experience, and their services were needed in areas of the state such as McCormick's district.

In the 1980s there was a strong movement in the House of Delegates to end this "temporary permit" option. Fearing that this movement jeopardized their

careers, several of the temporarily licensed doctors organized themselves, incorporated their group under the name "Coalfield Health Care Association" ("the Association"), and hired a lobbyist, John Vandergrift, to represent them in the state capital. Dr. Ernesto Manual was the leader of this group. In the 1984 West Virginia legislature, the Association and Vandergrift worked for legislation extending the temporary permitting procedures one more year. McCormick sponsored the House version of this proposed legislation which passed on the last day of the regular session of the legislature. Shortly thereafter, Vandergrift discussed with McCormick additional legislation, to be introduced during the 1985 session, providing a permanent solution to the doctors' problem by granting them a permanent medical license as a result of their years of experience. McCormick agreed to sponsor the 1985 legislation.

During his 1984 reelection campaign, McCormick communicated to Vandergrift that his campaign was expensive, that he had not "heard from" the doctors, and that he wanted Vandergrift to contact them. Vandergrift contacted Dr. Manual, and on the morning of June 1, 1984, Vandergrift received from Manual an envelope with nine one-hundred-dollar bills which he delivered to McCormick at his business office. McCormick's receipt of this money constituted basis for the extortion charge on which he was convicted. The government's evidence also showed that a second delivery of two thousand dollars in cash was made that same afternoon. McCormick neither reported these payments as campaign contributions on the required reporting statements nor listed them on his income tax return.[1] After June 1, McCormick

[1] West Virginia state election laws prohibit cash campaign contributions in excess of $50 per person. W. Va. Code § 3-8-5d (1987).

dealt directly with the doctors and received three more cash payments, on November 1, November 12, and December 19, 1984.

In the spring of 1985, McCormick sponsored H.B. 1431, which allowed experienced physicians to be permanently licensed without attaining the minimum passing score on the licensing exams. He spoke at length in favor of the bill during floor debate. The bill was passed by both houses of the legislature and signed into law by the Governor. According to the Government's evidence, on May 15, 1985, two weeks after H.B. 1431 became law, McCormick received the last cash payment from Manual.

For each of these payments, Manual wrote a check on the Association account payable to "Cash," cashed the check, and then placed the cash in envelopes which were personally delivered to McCormick's business office. Although Manual maintained detailed books of the Association's

expenditures, the only written records indicating the purpose of these checks were initials or other codes signifying that the funds were for McCormick. Furthermore, McCormick never reported these payments as campaign contributions nor accounted for them in his campaign's bookkeeping records.

In September 1988, a federal grand jury returned a six-count indictment against McCormick. The first five counts charged that McCormick had violated the Hobbs Act, 18 U.S.C. § 1951, by extorting the payments under color of official right. The final count charged him with filing a false income tax return, in violation of 26 U.S.C. § 7206(a), by failing to report as income the payments he received in 1984. At the close of the six-day jury trial, the jury convicted McCormick of the first count of extortion and of the income tax violation, but it could not agree on verdicts on the remaining counts and the trial court declared a mistrial on them. McCormick was fined $50,000, plus

$900 restitution and costs, plus three years suspended sentence and probation. He appealed his convictions to this court.

II.

McCormick argues that his conviction under the Hobbs Act is not supported by sufficient evidence. He claims that the payments were campaign contributions and not illegal payoffs because there was no coercion or quid pro quo exchange for the payments.

The Hobbs Act proscribes extortion, defined, for the purposes here pertinent, as obtaining property from another, with his consent, "induced . . under color of official right." The provision has been interpreted so as

> not [to] require proof of specific acts by the public officials demonstrating force, threats, or the use of fear so long as the victim consented [to the provision of a benefit] because of the office or position held by the official who obtained the money.

> If the public official knows the motivation of the victim focuses on the public official's office and money is obtained by the public official which was not lawfully due and owing to him or the office he represented, that is sufficient to satisfy the requirements of the law of extortion under color of official right.
>
> The mere voluntary payment of money would not constitute extortion.

United States v. Barber, 668 F.2d 778, 783 (4th Cir.), cert. denied, 459 U.S. 829, 103 S. Ct. 66, 74 L. Ed. 2d 67 (1982) (quoting United States v. Hedman, 630 F.2d 1194, 1194-95 n.4 (7th Cir. 1980), cert. denied, 450 U.S. 965, 101 S. Ct. 1481, L. Ed. 2d 614 (1981)); see also United States v. Paschall, 772 F.2d 68, 71 (4th Cir. 1985), cert. denied, 475 U.S. 1119, 106 S. Ct. 1635, 90 L. Ed. 2d 181 (1986). In Barber, this court also noted:

> The line is a fine one between an altogether "voluntary" payment and the conferring of a benefit on someone who holds a particular public office in fear of retaliation or in expectation of benefit. . . . [I]f read literally, the [language of the Hobbs Act] could arguably prohibit a public official from personally soliciting a campaign contribution.

Barber, 668 F.2d at 783.

This case revolves primarily around the question of whether the money McCormick received was the result of extortion or only an illegal campaign contribution. If the payments were "induced under color of official right" and paid to preserve McCormick's support of H.B. 1431, then the money violated the Hobbs Act. On the other hand, financial contributions in support of candidates are a legitimate and integral part of the democratic process today in America. See Buckley v. Valeo, 424 U.S. 1, 21, 96 S. Ct. 612, 635, 46 L. Ed. 2d 659 (1976). If the money was a voluntary campaign contribution, then McCormick is guilty only of violating state election laws.

Although we acknowledge that the facts in this case present a fine distinction, we hold that there was substantial evidence, viewed in the light most favorable to the government, for the jury to conclude that the first payment was extorted in violation of the Hobbs Act.

See, e.g., United States v. Suthard, 820 F.2d 662, 663 (4th Cir. 1987); Evington v. Forbes, 742 F.2d 834, 835 (4th Cir. 1984) (standard of review of jury verdicts).

A.

In cases involving non-elected officials receiving benefits, this court has held that it is not "necessary for the government to prove as a part of its case that the public official misused his office in the sense that he granted some benefit or advantage to his benefactor to which the benefactor was not entitled." United States v. Paschall, 772 F.2d 68, 71 (4th Cir. 1985), cert. denied, 475 U.S. 1119, 106 S.Ct. 1635, 90 L. Ed. 2d 181 (1986) (North Carolina Department of Transportation officials receiving free trips to Hilton Head and Texas); see also United States v. Spitler, 800 F.2d 1267, 1274 (4th Cir. 1986) (Maryland State Highway Administration official receiving handguns, rifles, and jewelry). "A public official's retention of things of value paid to him by private persons for

performance of his official duty is a misuse of his office." Paschall, 772 F.2d at 74.

However, the receipt of voluntary campaign contributions by elected representatives should not, of course, constitute a violation of the Hobbs Act. The difficulty lies in articulating a standard to distinguish such campaign contributions to elected representatives from monies extorted because of the official's position. In United States v. Dozier, 672 F.2d 531 (5th Cir.), cert. denied, 459 U.S. 943, 103 S. Ct. 256, 75 L. Ed. 2d 200 (1982), the Fifth Circuit upheld the Hobbs Act conviction of an elected state agriculture commissioner who solicited campaign contributions and other money -- ranging up to $200,000 -- through explicit promises or threats concerning his future official acts. Dozier unsuccessfully argued that the Hobbs Act is unconstitutionally vague as applied to elected officials soliciting legitimate political contributions. Although acknowledging the "reasonableness of these

apprehensions," the court upheld the application of the Hobbs Act to elected officials:

> A moment's reflection should enable one to distinguish, at least in the abstract, a legitimate solicitation from the exaction of a fee for a benefit conferred or an injury withheld. Whether described familiarly as a payoff or with the Latinate precision of quid pro quo, the prohibited exchange is the same: a public official may not demand payment as inducement for the promise to perform (or not to perform) an official act.

Id. at 537.

In many cases, Courts of Appeals have upheld Hobbs Act convictions of elected officials that involved quid pro quo exchanges. See, e.g., United States v. Cerilli, 603 F.2d 415 (3d Cir. 1979) (equipment leases), cert. denied, 444 U.S. 1043, 100 S. Ct. 728, 62 L. Ed. 2d 728 (1980); United States v. Wright, 588 F.2d 31 (2d Cir.) (school book purchases), cert. denied, 440 U.S. 917, 99 S. Ct. 1236, 59 L. Ed. 2d 467 (1979); United States v. Mazzei, 521 F.2d 639 (3d Cir.) (rental property leases), cert. denied, 423 U.S. 1014, 96 S. Ct.

446, 46 L. Ed. 2d 385 (1975). These cases, however, do not stand for the proposition that such exchanges are required for a conviction under the Hobbs Act.

The Second Circuit has explicitly held that a quid pro quo exchange is not required for political contributions to constitute a violation of the Hobbs Act. In United States v. Trotta, 525 F.2d 1096 (2d Cir. 1975), cert. denied, 425 U.S. 971, 96 S. Ct. 2167, 48 L. Ed. 2d 794 (1976), the indictment alleged that a Commissioner of Public Works demanded and induced payments in political contributions to the local Republican Committee from an engineering firm. The court on appeal held that the indictment did not have to allege a specifically identifiable misuse of office by the official on behalf of the payor in return for the payment of money. Id. at 1100. It recognized that such a quid pro quo may be present in an extortion, but as long as the use of official power is the basis for the extortion, then it is not an essential element of the crime.

granted some benefit or advantage in exchange for the money paid to him. Elected officials should be held to standards at least as high as non-elected officials. Therefore, we now hold that the circumstances surrounding money given to elected officials may be sufficient, without proof of an explicit quid pro quo exchange, to prove that the payments were never intended to be legitimate campaign contributions. Receiving such payments violates the Hobbs Act. Some of the circumstances that should be considered in making this determination include, but are not limited to, (1) whether the money was recorded by the payor as a campaign contribution, (2) whether the money was recorded and reported by the official as a campaign contribution, (3) whether the payment was in cash, (4) whether it was delivered to the official personally or to his campaign, (5) whether the official acted in his official capacity at or near the time of the payment for the benefit of the payor or supported

We agree with the Second Circuit that alleged "political contributions" may violate the Hobbs Act in more than one way. When there are specific promises given or threatened actions withheld in exchange for political contributions, such as in Dozier, this quid pro quo exchange is persuasive evidence that the money was extorted in violation of the Hobbs Act. But in addition, if payments to elected officials are not treated as legitimate campaign contributions by either the payor or the official, then a jury may reasonably infer that these payments are also induced by the official's office in violation of the Hobbs Act. Otherwise, unless there was an explicit quid pro quo promise, elected officials could avoid the Hobbs Act merely by calling the money "campaign contributions." In this situation, the actual intent of the parties is the key determining factor.

In Paschall and Spitler, this court did not require the government to prove that the non-elected official

legislation that would benefit the payor, (6) whether the official had supported similar legislation before the time of the payment, and (7) whether the official had directly or indirectly solicited the payor individually for the payment.

Violations of state election laws, while an appropriate consideration in characterizing the payments, do not create per se violations of the Hobbs Act. Careless reporting of otherwise legitimate political contributions should not subject elected officials to prosecution for this serious federal offense, and prosecutors should exercise caution to avoid arbitrary and selective prosecution of elected representatives. But when an official does not intend a payment to be a campaign contribution, a jury should be allowed to infer from the circumstances surrounding the payment that it is in fact a payoff violating the Hobbs Act.

B.

Under the facts of the present case, Dr. Manual's payments to McCormick do not appear to be legitimate campaign contributions. McCormick, Vandergrift, and Dr. Manual all knew that cash campaign contributions greater than fifty dollars were illegal in West Virginia. Nevertheless, the payments were made with one hundred dollar bills placed in sealed envelopes and delivered to McCormick personally at his office. The payments were not reported on McCormick's campaign financial statements, nor were they recorded in the Association's books as campaign contributions. Although McCormick had supported in the past the foreign-educated doctors practicing with a temporary permit in his district, his continued support was essential in order for them to receive a permanent license. Knowing this, he told their lobbyist that he had not "heard from" the doctors.

Under these facts, a reasonable jury could find that McCormick was extorting money from the doctors for his continued support of the 1985 legislation. Further, the evidence supports the conclusion that the money was never intended by any of the parties to be a campaign contribution. Therefore, we refuse to reverse the jury's verdict against McCormick for violating the Hobbs Act.

III.

The jury also found that McCormick had failed to report the money received from Dr. Manual in 1984 on his federal income tax returns in violation of 26 U.S.C. § 7206(a). McCormick's only defense to this charge was that the money was not personal income but rather was a contribution to his reelection campaign. Revenue Ruling 71-449, 1971-2, C.B. 77. The fact, however, that the jury convicted McCormick

of violating the Hobbs Act under these facts implicitly indicates that it rejected his attempts to characterize at least the initial payment as a campaign contribution. Therefore, the jury found the funds were personal income, and this court affirms McCormick's conviction on this count also.

IV.

McCormick also contends that the government's evidence and arguments regarding his alleged violations of state campaign laws and Vandergrift's payment of some of his expenses during the 1985 legislative session deprived him of a fair trial. As explained above, evidence of reporting or not reporting payments received by an elected official is a relevant consideration to determine whether the payments are or are not campaign contributions. Therefore, this evidence was admissible and did not deprive McCormick of a fair trial.

Last, evidence concerning Vandergrift's payment of some of McCormick's expenses may be of uncertain relevance, but, again, admission of this evidence certainly did not deprive McCormick of a fair trial.

V.

There was sufficient evidence to support the jury's verdict, and the convictions of McCormick are

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED STATES OF AMERICA

v. CRIMINAL ACTION NO. 2:88-00220

ROBERT L. McCORMICK

ORDER

This case came on for trial before the court and a jury on November 28, 29 and 30 and December 1, 2, 5, 6 and 7, 1988, the defendant Robert L. McCormick appearing in person and by Rudolph L. DiTrapano and Rebecca A. Baitty, his counsel, and the United States of America appearing by Michael W. Carey, United States Attorney, and Nancy C. Hill, Assistant United States Attorney.

The defendant having previously entered the plea of NOT GUILTY as to each count of the within six-count indictment, the jury retired and rendered its verdict on December 7, 1988, as follows:

We, the Jury, find the defendant, Robert L. McCormick, Guilty of the charge contained in count one of the indictment.

We, the Jury, find the defendant, Robert L. McCormick, Guilty of the charge contained in count six of the indictment.

/s/ John Cruikshank (Foreperson's Signature) December 7th, 1988 (Date)

The court ascertained that the verdict represented the unanimous opinion of the members of the jury and finding the verdict to be in due form, the verdict was accepted and the Clerk was directed to file the verdict.

Accordingly, the defendant is adjudged GUILTY as charged in counts one and six of the indictment, and the defendant stands convicted of one violation of Title 18, United States Code, Sections 1951(a) and 2, as charged in count one, and one violation of Title 26, United States Code, Section 7206(1), as charged in count six.

The foreperson of the jury having informed the court that the jury was unable to reach a unanimous verdict as to counts two through five, a mistrial is declared as to those counts. The United States shall advise the court by December 13, 1988, whether it will retry the defendant on counts two through five.

It is ORDERED that the Probation Department of this court conduct a presentence investigation of the defendant and report to the court thereon, and that the defendant appear before this court at 1:15 p.m. on February 8, 1989, for final disposition of this action.

The defendant has until December 16, 1988, to file post-trial motions.

The bond previously executed by the defendant is continued for his appearance on February 8, 1989, and at such other time as the court may direct.

The Clerk is directed to forward certified copies of this order to the defendant and all counsel of record.

DATED: December 9, 1988

JOHN T. COPENHAVER, JR.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED STATES OF AMERICA

v. CRIMINAL ACTION NO. 2:88-00220

ROBERT L. McCORMICK

JUDGMENT AND PROBATION ORDER

On the 8th day of February, 1989, the United States of America appeared by Michael W. Carey, United States Attorney, and the defendant appeared in person and by Rudolph L. DiTrapano and Rebecca A. Baitty, his counsel, for final disposition of the charge on which the defendant stands convicted upon the verdict of the jury in this action on December 7, 1988.

The defendant having been convicted as aforesaid of one violation of Title 18, United States Code, Sections 1951(a) and 2 (extortion), as charged in count one, and one violation of Title 26, United

States Code, Section 7206(1) (false tax return), as charged in count six of the six-count indictment filed in this case on September 9, 1988; and the court having complied with the requirements of Rule 32(a) (1) (A), (B) and (C) and (c) (3) (A), (C) and (D) of the Federal Rules of Criminal Procedure, it is accordingly

ORDERED, pursuant to Title 18, United States Code, Section 3579, that the defendant shall make restitution in the amount of NINE HUNDRED DOLLARS ($900.00) to the victim of the offense in count one, which shall be payable on or before April 10, 1989.

It is further ORDERED that the defendant shall pay a fine to the United States in the amount of TEN THOUSAND DOLLARS ($10,000.00) as to count one and a fine of FIFTY THOUSAND DOLLARS ($50,000.00) as to count six, such fines to be inclusive of each other, for a total fine on both counts of FIFTY THOUSAND DOLLARS ($50,000.00), payable on or

before April 10, 1989. After April 10, 1989, any unpaid balance of the fine shall bear interest at the rate of ten per cent (10%) per annum. Until all fines, restitution, costs and special assessment are fully paid, the defendant shall advise the United States Attorney for this district within thirty days of any change in his residence or mailing address.

It is further ORDERED, pursuant to Title 26, United States Code, Section 7206(1), that the defendant shall pay the costs of prosecution in the amount of ONE THOUSAND, SIX HUNDRED FORTY-SEVEN DOLLARS and FIFTY CENTS ($1,647.50), which shall be payable on or before February 18, 1989.

It is further ORDERED, pursuant to Title 18, United States Code, Section 3013(a), that defendant shall pay a special assessment of FIFTY DOLLARS ($50.00) as to count six, which shall be payable on or before February 18, 1989.

It is further ORDERED, pursuant to Title

18, United States Code, Section 3651, that imposition of sentence of imprisonment is suspended and the defendant is hereby placed on probation for a period of THREE (3) YEARS as to each of counts one and six, to run concurrently, upon the terms and conditions set forth in Probation Form No. 7, and upon the following special conditions:

1. The defendant shall make payment of the restitution, fine, costs of prosecution and special assessment hereinabove imposed as directed by the court; and

2. The defendant shall file a true and correct 1984 U. S. Individual Income Tax Return, Form 1040, as soon as feasible.

The court may change the conditions of probation or reduce the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a

violation occurring during the probation period.

The court advised the defendant that he had ten (10) days from the date of entry of this order within which to appeal the foregoing conviction and sentence, and of his right to prosecute such appeal in forma pauperis should he qualify.

The Clerk is directed to forward certified copies of this order to the defendant, Robert L. McCormick, 299 River Drive, Logan, West Virginia 25601, counsel of record, the United States Probation Department, and the United States Marshal.

DATED: February 9, 1989

JOHN T. COPENHAVER, JR.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-5702

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ROBERT L. MCCORMICK

Defendant - Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Chief Judge Ervin, with the concurrence of Judge Chapman and Judge Williams.

For the Court,

/s/ JOHN M. GREACEN
Clerk

FILED March 7, 1990

TRANSCRIPT EXCERPTS

I. The Purpose of the Payment

A. Testimony of John Vandergrift

John Vandergrift testified that the payment was requested by Mr. McCormick just prior to the primary election of 1984, as a campaign contribution:

> He expressed to me that his campaign was rather expensive, the election was coming up, and that he had put out a couple of thousand dollars out of his pocket and he hadn't heard anything from the foreign physicians and he wanted to know what I was going to do about it.

[Tr. Vol. 2, pp. 167-68].

On cross examination by defendant's counsel, Vandergrift confirmed:

> Q. In any event, the thrust of the conversation was that he wanted you to go to the doctors to get a campaign contribution; is that right?
>
> A. Yes, sir.

[Tr. Vol. 3, p. 234].

On redirect examination, Vandergrift again characterized the transaction as a campaign contribution:

Q. You stated "I would not take the risk to not give it to him."

A. That's correct.

Q. And this -- focusing now on the telephone conversation in late May of 1984 when you called Mr. McCormick and he said the things to you that you have testified about and you took the action that you testified about,--

A. Yes.

Q. -- was there something about his manner that led you to believe there was a risk?

A. He was very rough, and I read the tone of his voice that he wanted a campaign contribution, that he needed it.

[Tr. Vol. 3, pp. 281-82].

Mr. Vandergrift stated that he telephoned Dr. Manuel soon thereafter:

> I relayed the conversation to Dr. Manuel and told him -- stressed to him I thought it was very important that we get some money to help Bob in his campaign. [Tr. Vol. 2, p. 169].
>
> * * *
>
> Q. [Y]ou gave this to him for his campaign in Logan county; is that

correct? Is that your testimony?

A. Yes, sir. [Tr. Vol. 3, p. 248].

* * *

Q. If you -- you say that he needed the money? Is that what your testimony was that he needed the money?

A. For his campaign, yes.

* * *

Q. You said he needed the money for campaigns.

A. Yes. [Tr. Vol. 3, p. 282].

B. Government's Closing Argument

In its closing argument to the jury the government acknowledged that the purpose of the payment to Mr. McCormick was to reimburse the candidate for campaign expenses:

> [I]f you will turn to one of the campaign statements that tnis defendant filed with the Secretary of State, he states here on May 21 of 1984, that **he had made a personal loan to his campaign of 3,000 dollars**, which is support for what John Vandergrift said this defendant told him in late May of 1984, which was that **this defendant had taken some of his own money out of his pocket, put in his campaign, and he wanted that money**

back. He wanted the money back into his pocket.

[Tr. Vol. 7, p. 1120-21].

II. The Donor's Intent

A. Testimony of Dr. Ernesto Manual

> [H]e had been working hard for us, you know. And let me tell you that he had never asked or demanded anything for his work from me. [Tr. Vol. 3, p. 316].
>
> * * *
>
> Q. Did you say he never asked or demanded anything from you?
>
> A. Let me elaborate on that. Mr. McCormick is sponsor of the bill, and I can swear under oath and I am still under oatn, that his intentions to help us, being his constituent, and also that Mr. McCormick is not only receiving the request from us as a group but from the people surrounding the Logan County area to help us because we have done so many services to the community, and being in the legislature, he agrees to sponsor a bill to this effect. [Tr. Vol. 3, p. 317].
>
> * * *
>
> A. Mr. McCormick put this bill into motion, help us, and never asked us for anything. There are some other -- I've been in Logan since 1975, and Mr. McCormick has never asked me for any personal payment. [Tr. Vol. 3, p. 331].
>
> * * *
>
> Q. And isn't it true, Dr. Manuel, that you observed and saw and knew that Mr. McCormick was working for this bill, working for temporary permits and granting extensions before you had any conversation with him about what he was concerned with? Am I correct?
>
> A. Yes, sir.
>
> Q. He had been requested by authorities other than the foreign medical graduates and the doctor -- the Philippino community, so to speak, in Logan County; is that not correct?
>
> A. Yes, sir. He is receiving requests from several groups of concerned citizen.
>
> Q. And he was committed to that, was he not?
>
> A. He is dedicated to that. Then he promised that he will do the best thing that he can. Because his request is not only coming from one segment of society, but from all segments of the Logan County people, concerned citizens. [Tr. Vol. 3, p. 341].
>
> * * *

[L]et me repeat that he had never asked me for any favor or money during the course of this, making the bills and then passing the bills and helping us pass the bills. [Tr. Vol. 3, p. 358].

* * *

Q. Did Bob McCormick by manner or by speech or by gesture or by any nuance known to man, did you get any message from him that he wanted money from you?

A. No, sir. [Tr. Vol. 3, p. 359].

* * *

Q. Dr. Manuel, you've already testified about Mr. McCormick's expression with respect to him receiving money, that what he didn't do or didn't ask for and didn't give you indication he wanted it. Did you think by giving him money, it would cause him to do anything any different than he already had been doing, that it would sustain his interest or do anything any different than he, McCormick, was already doing for you?

A. I don't think so because Mr. McCormick is a well-financed man and I don't see any expression of interest in money in him. [Tr. Vol. 3, p. 363].

Dr. Manuel testified that he visited Mr. McCormick on several occasions during 1984 and

1985 to discuss the status of the legislation Mr. McCormick was sponsoring for the doctors:

> Q. And who sponsored that legislation?
>
> A. Mr. McCormick.
>
> Q. Did you talk with him about it during the period of time that it was being considered by the West Virginia legislature?
>
> A. I occasionally asked him the status of the bill. On occasions I have done because he is a very busy man, I always asked him what the status of the bill is.

[Tr. Vol. 3, p. 325].

During one of those visits, the doctor said:

> A. Well, as I mentioned to you, Mr. McCormick is working hard for us and I know that he is dedicated to help us, being his constituent. And at the time he always – he even scolded me – for spending too much money and that he is doing the best that he can in the right way. And at the end of the particular conversation, I remember that I ask Mr. McCormick is there any other thing that I can do."

* * *

Q. And what did he say when you asked him if there was anything else you

could do?

> A. The recollections that I have is he mentioned to me that there are other candidates that are having a difficult time in the election and if, you know, helping those candidates will not harm their cause – my cause.

[Tr. Vol. 3, p. 315].

On three subsequent occasions, he stated, he gave Mr. McCormick envelopes containing cash -- $800, $600, and $950, respectively -- and told Mr. McCormick to give it to any supporters of the legislation who needed campaign funding. [Tr. Vol. 3, pp. 319-32].

> Q. Well, what did you do with the money?
>
> A. I just – see, when the 600 dollars that I initially gave to Mr. McCormick to help all those people that I said that are in dire maybe political need, I know that at the time this money is a very small amount of money for that particular expenses. So I decided that if I can garnish some more money, then I will do that.
>
> Q. So this was the second half, so to speak, of the money that you had delivered previously in December; is that what you are saying?
>
> A. Yes, ma'am, but allow me to say

something, that this money had never been intended for Mr. McCormick. [Tr. Vol. 3, p. 328.]

* * *

> Q. And what did you do with the envelope with 950 dollars in cash in it?
>
> A. I just left it -- I just left it on the table. And then I said I wish that this will help those additional people that needs the money. [Tr. Vol. 3, pp. 330-331.]

He testified, again, that he did not believe that making these contributions through Mr. McCormick would influence Mr. McCormick in any way [Tr. Vol. 3, pp. 368-69].

> Q. And did you give Mr. McCormick that cash in order to influence him in his actions in connection with the bill that you wanted to have passed to get your license?
>
> * * *
>
> A. Let me answer it this way, that he is a person that is helping us with sponsoring a bill, and I know because of my experience in going there by myself, that other people is needed, and that by helping all those other people, maybe I can make his job easier for him. [*Id.*]

Dr. Manuel added:

> Q. And what did you do with the money

that you received from that check?

A. I took it to Mr. McCormick office. But let me just add a little bit if I'm not out of order here, that most of this checks that I brought to Mr. McCormick is almost on my insistence.

Q. You are saying –

A. I am the one is almost pushing this through.

[Tr. Vol. 3, p. 323].

B. Testimony of John Vandergrift:

John Vandergrift testified that he initially approached Mr. McCormick after the 1983 session because he "had found out that he was very helpful with the foreign doctors and concerned about their cause" [Tr. Vol. 3, p. 230].

Q. Now, you also testified yesterday, I believe, Mr. Vandergrift, that you saw the need that these foreign medical graduates trained doctors had for a lobbyist to enable them to obtain the legislation that would enable them to become permanently licensed; is that not correct?

A. Yes, sir.

Q. Then you became interested in representing those people, did you not?

A. Yes, sir.

Q. Now, you didn't want to approach them individually because you felt that you had very little or no contact with those doctors; is that not correct?

A. That's correct.

Q. So I believe your testimony was in light of that lack of intimacy with those doctors, that you asked Bob McCormick if he could intercede for you; is that right?

A. Yes, sir.

Q. Because he had connection with those doctors; is that correct?

A. He knew them, yes, sir.

Q. And he had been working with them for several years, was committed to the idea, and that's why you went to him; is that true?

A. Yes, sir.

Q. He knew Dr. Manuel because he had been instrumental in getting those temporary permits; is that correct?

A. Yes, sir.

[Tr. Vol. 3, p. 230].

Q. Now, when you came in contact with Bob McCormick, he had already been committed to work for the foreign doctors, for this bill, temporary permit bill; is that not correct?

A. Yes, sir.

Q. And he was already, as you I think described it and admit, he was working enthusiastically; is that not correct?

A. Yes, sir.

Q. You didn't have to do anything to sustain the activity and the fever and the enthusiasm of Bob McCormick for this bill. It was there before you even came on the scene, was it not?

A. His enthusiasm was there, yes, sir.

Q. He was for the bill?

A. Yes, sir.

* * *

Q. Whatever contact you had with McCormick in that connection was superfluous because you knew where he stood on it; is that not correct?

A. Yes, sir.

Q. It wasn't necessary for you to encourage him or to point out the merits of the bill or the negatives about not

having doctors because you knew where he stood. Is that not correct?

A. That's correct.

Q. And it wasn't necessary to wine and dine Bob McCormick to keep his interest in that bill, was it?

A. No, sir.

[Tr. Vol. 3, pp. 228-29].

* * *

Q. In answer on redirect to Mrs. Hill's question to you, you said that you gave these contributions, the campaign contribution to Mr. McCormick because you wanted him to sponsor this legislation; is that correct?

A. To continue his support, yes.

Q. Did he ever give you any indication whatsoever to you or to anybody else that his interest had waned in this bill at any time in 1984?

A. Other than the phone conversation, no, sir.

Q. Well, the phone conversation had to do, as you've testified to, with a political contribution. He didn't say I'm not going to do this, did he, --

A. No, sir.

Q. – if he didn't get it?

* * *

Q. You didn't have to give him a campaign contribution to sustain his interest because you knew his interest was there before you came on the scene, while you were on the scene, and after you were on the scene; isn't that true?

A. I wouldn't take the risk of not giving it to him.

Q. That's a risk that you calculated; is that not correct?

A. That's correct.

Q. He gave you no basis for you having that doubt about his sincerity about that bill, did he? Did he say anything to you about it?

A. No, sir.

Q. By any demonstrated, any expression, by any word of mouth, by anything he did, you had no reason in the world to believe he wasn't interested in that bill at all times, did you?

A. No, sir, that's true.

[Tr. Vol. 3, pp. 280-81].

JURY INSTRUCTIONS
GIVEN DECEMBER 5, 1989
(EXCERPTS)

I. ELEMENTS OF EXTORTION CHARGE

Now, then, with respect to the first five counts of the indictment -- and you are going to have the indictment in the jury room with you, keeping in mind, as you are already aware, of course, that it is not evidence. Counts one through five, the so-called extortion counts, allege that on or about five specified dates during 1984 and 1985, that is, one such date in each count, the defendant affected or attempted to affect interstate commerce by using his public office as a member of the West Virginia House of Delegates to extort illegal cash payments from certain foreign doctors holding temporary permits to practice medicine in the state who had failed to pass the required examination and who were attempting to obtain permanent medical licenses.

Each of the five counts alleges an approximate amount of cash was paid directly and indirectly by the foreign doctors or on their behalf to the defendant and that the payments were not due the defendant or his office. Each alleged payment constitutes a separate offense.

Now, before the defendant may be found guilty of the charge contained in counts one through five, the government must prove beyond a reasonable doubt each of the following three essential elements as to each such count:

1. That at or near the time and place alleged, the defendant induced a cash payment from foreign doctors, as alleged in such count;

2. That the defendant did so knowingly and willfully by extortion; and

3. That in doing so, the defendant affected or attempted to affect interstate commerce.

* * *

Extortion means the obtaining of property from another, with his consent, either induced by the wrongful use of fear or induced under color of official right.

The term "wrongful" means the obtaining of property unfairly and unjustly by one having no lawful claim thereto.

As to inducement, the United States must prove that the defendant induced the person or persons described in the indictment to part with property, a term which includes money. It is charged that the defendant did so under color of official right.

In proving this element, it is enough that the government prove beyond a reasonable doubt that the benefactor transferred something of significant value, here alleged to be money, to the public official with the expectation that the public official would extend to him some benefit or refrain from some harmful action, and the public official accepted the money knowing it was being transferred to him with that expectation by the benefactor and because of his office.

In determining whether the defendant induced a person or persons described in the indictment to part with property at the time of the alleged events in counts one and two, occurring as you'll recall on June 1, 1984 as alleged in the indictment and if you believe it as set forth in some of the evidence adduced, you may take into account all the surrounding circumstances, including any word spoken by or actions of the defendant, if any, prior thereto or in connection therewith. In determining whether the defendant induced a person or persons described in the indictment to part with property alleged in counts three, four, and five, you may take into account all the surrounding circumstances, including any course of conduct on the part of the defendant, if any, which may bear thereon.

And so, inducement can be in the overt form of a demand, or in a more subtle form such as custom or expectation such as might have been communicated by the nature of the defendant's prior conduct of his office, if any.

As to color of official right, in this case the government has charged that extortion was committed under color of official right, in that the defendant is charged with committing extortion by virtue of his office as a member of the West Virginia House of Delegates.

Extortion under color of official right means the obtaining of money by a public official when the money obtained was not lawfully due and owing to him or to his office.

Extortion under color of official right does not require proof of specific acts by the public official demonstrating force, threats, or the use of fear so long

as the victim consented because of the office or position held by the official.

Where, as here, the indictment charges that the alleged extortion was committed under color of official right, the government need not prove that the alleged victim of the extortion, here the unlicensed doctors, was, in fact, in a state of fear at the time the payments in question were made, although they may have been, that is, the evidence may indicate to you conceivably that that is the case, but that, of course, is not of particular moment.

Extortion under color of official right is committed whenever a public officer makes wrongful use of his office to obtain money not due to him or his office. It is the public official's misuse of his office which, by itself, supplies proof of the necessary element of coercion. Therefore, the wrongful use of official power need not be accompanied by actual or threatened force, violence, or fear.

If the public official knows the motivation of the victim to make any payment focuses on the public official's office, and money is obtained by the public official which was not lawfully due and owing to him or the office he represented, that is sufficient to satisfy the government's burden of showing a misuse of office and extortion under color of official right. The mere voluntary payment of money, however, does not constitute extortion.

Finally, to prove extortion under color of official right, the government need not establish that the defendant actually possessed authority over the passage of the legislation in question. Similarly, the payments need not have been made directly or

ultimately to the public official. It is sufficient if the evidence shows that the victim was induced to deliver money to someone as a result of the defendant's office.

There has been evidence in this case that for some years before 1984, as well as during the 1984 and 1985 legislative session, the defendant was a leading supporter of legislation to permit foreign medical school graduates who did not meet all the medical licensing requirements to practice in areas of West Virginia that needed physicians.

It would not be illegal, in and of itself, for the defendant to solicit or accept political contributions from foreign doctors who would benefit from this legislation.

In order to find Mr. McCormick guilty of extortion, you must first be convinced beyond a reasonable doubt that the payment alleged in a given count in the indictment was made by or on behalf of the doctors with the expectation that such payment would influence Mr. McCormick's official conduct, and with the knowledge on the part of Mr. McCormick that they were paid to him with that expectation by virtue of the office he held.

It is not illegal, in and of itself, for an elected legislator to solicit or accept legitimate campaign contributions, on behalf of himself or other legislators, from individuals who have a special interest in pending legislation. The solicitation or receipt of such contributions violates the federal extortion law only when the payment is wrongfully induced under color of official right.

Many public officials receive legitimate political contributions from individuals who, the official knows, are motivated by a general gratitude toward him because of his position on certain issues important to them, or even in the hope that the good will generated by such contributions will make the official more receptive to their cause.

The mere solicitation or receipt of such political contributions is not illegal.

It is not necessary that the government prove in this case that the defendant misused his public office in the sense that he granted some benefit or advantage to the person or persons, here the unlicensed doctors, who allegedly paid him money. Though the unlicensed doctors may have gotten no more than their due in the defendant's performance of his official duties, the defendant's receipt of money, if you find that to have occurred, for the performance of such acts is a misuse of office. When a public official accepts the payment for an implicit promise of fair treatment, if any such promise there were, there is an inherent threat that without the payment, the public official would exercise his discretion in an adverse manner. A claim that a public official's actions would have been the same whether or not he received the alleged payments is, for this purpose, irrelevant and is no defense to the charges contained in counts one through five of the indictment.

So it is not necessary that the government prove that the defendant committed or promised to commit a quid pro quo, that is, consideration in the nature of official action in return for the payment of money not lawfully owed. Such a quid pro quo may, of course, be forthcoming in an extortion case or it

may not. In either event it is not an essential element of the crime.

[Tr. Vol. 7, pp. 1181-87].

II. ELEMENTS OF TAX CHARGE

Now, in count six, it is alleged that on or about April 23, 1985, in the Southern District of West Virginia, the defendant willfully made, subscribed, and filed a false 1984 United States Individual Income Tax Return, Form 1040, which was verified by a written declaration that it was made under penalties of perjury, and which reflected taxable income of 52,845 dollars, with a tax due of 12,046 dollars, when the defendant knew and believed the correct taxable income was approximately 57,000 dollars, that is, 57,145 dollars.

[There are three essential elements required to prove beyond a reasonable doubt before the defendant may be found guilty of the offense charged in count six.

1. That on or about the date and place alleged in count six, the defendant did willfully make or subscribe a tax return described in that count, which was filed with the Internal Revenue Service, and which was false as to the material matter charged in count six;

2. That the return was verified by written declaration that it was made under the penalties of perjury; and

3. That the defendant did not believe the tax return to be true and correct as to the material matter alleged in count six.

Again, the burden is always on the government to establish each of these elements by proof beyond a reasonable doubt. The law never imposes upon a defendant in a criminal case the burden of introducing any evidence or calling any witnesses.]

The court instructs you that the question of the materiality of the alleged false statements made in connection with the signing of a tax return is a question of law for the court. The court further instructs you that if you find that the defendant willfully failed to report all his taxable income as stated in the indictment in count six, then I further instruct you that such failure to report all of his taxable income is a material matter under the law. In this regard, the United States does not have to show that the defendant failed to report any particular amount of taxable income, but, rather, that the defendant failed to report some taxable income.

[The word "subscribe" simply means the signing of one's name to a document. The fact that an individual's name is signed to a return is prima facie evidence for all purposes that the return was actually signed by him, which is to say that unless and until outweighed by evidence in the case which leads you to a different and contrary conclusion, you may find that a filed tax return was in fact signed by the person whose name appears to be signed to it.

In proving that the defendant violated the charges contained in count six, or at least attempting to do so, the government does not have to prove that

there was a tax due and owing for the year in issue. Whether the government has or has not suffered a pecuniary or monetary loss as a result of the alleged return is not an element of the crime charged in count six.][1] [Tr. Vol. 7, pp. 1188-1190].

* * *

Count six of the indictment charges that the defendant willfully filed a false income tax return for the year 1984 by failing to declare as taxable income the 4300 dollars he allegedly received in that year from John Vandergrift and Dr. Manuel.

Even if you believe that the defendant was given all or part of the money, if the money was purely a gift, without expectation of benefit, or if it constituted voluntary political contributions, whether one or more, it was to that extent not taxable income and Mr. McCormick's failure to report it on his tax return was not illegal. [Tr. Vol. 7, p. 1191].

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[1] The bracketed instructions were substantially repeated on the following day.

SUPPLEMENTAL JURY INSTRUCTIONS
GIVEN DECEMBER 6, 1989
(EXCERPTS)

I. ELEMENTS OF EXTORTION CHARGE

Before the defendant may be found guilty of the charge contained in counts one through five, the government must prove beyond a reasonable doubt each of the following three essential elements as to each such count:

One, that at or near the time and place alleged, the defendant induced a cash payment from the foreign doctors, as alleged in such count;

Secondly, that the defendant did so knowingly and willfully by extortion; and

Third, that in doing so, the defendant affected or attempted to affect interstate commerce. [Tr. Vol. 8, p. 1238].

***

The term "extortion" means the obtaining of property from another, with his consent, either induced by the wrongful use of fear or induced under color of official right.

The term "wrongful" means the obtaining of property unfairly and unjustly by one having no claim thereto.

The United States must prove that the defendant induced the person or persons described in the indictment to part with property, a term which includes

money. It is charged that the defendant did so under color of official right.

In proving this element, the government must prove beyond a reasonable doubt that the benefactor transferred something of significant value, here alleged to be money, to the public official with the expectation that the public official would extend to him some benefit or refrain from some harmful action, and the public official accepted the money knowing it was being transferred to him with that expectation by the benefactor and because of his office.

In determining whether the defendant induced the person or persons described in the indictment to part with property at the time of the alleged events in counts one and two, you may take into account all the surrounding circumstances, including any words spoken by or actions of the defendant, if any, prior thereto or in connection therewith. In determining whether the defendant induced the person or persons described in the indictment to part with property as alleged in counts three, four, and five, you may take into account all the surrounding circumstances, including any course of conduct on the part of the defendant, if any, which may bear thereon.

And so, inducement can be in the form of a demand, or in a more subtle form such as custom or expectation such as might have been communicated by the nature of the defendant's prior conduct of his office, if any.

In this case, the government has charged that extortion was committed under color of official right, in that the defendant is charged with committing extortion

by virtue of his office as a member of the West Virginia House of Delegates.

Extortion under color of official right means the obtaining of money by a public official when the money obtained was not lawfully due and owing to him or to his office. Of course, extortion does not occur where one who is a public official receives a legitimate gift or a voluntary political contribution even though the political contribution may have been made in cash in violation of local law. Voluntary is that which is freely given without expectation of benefit. And that term "voluntary" appears in several places during the course of these instructions.

Extortion under color of official right does not require proof of specific acts of the public official demonstrating force, threats, or the use of fear so long as the victim consented because of the office or position held by the office.

Where, as here, the indictment charges that the alleged extortion was committed under color of official right, the government need not prove that the alleged victim of the extortion, here the unlicensed doctors, was, in fact, in a state of fear at the time the payments in question were made, although they may have been.

Extortion under color of official right is committed wherever a public officer makes wrongful use of his office to obtain money not due to him or his office. It is the public official's misuse of his office which, by itself, supplies proof of the necessary element of coercion. Therefore, the wrongful use of the official power need not be accompanied by actual or threatened force, violence, or fear.

If the public official knows the motivation of the victim to make any payment focuses on the public official's office, and money is obtained by the public official which was not lawfully due and owing to him or the office he represented, or which he was not otherwise lawfully entitled to receive, that is sufficient to satisfy the government's burden of showing a misuse of office and extortion under color of official right. However, again, the mere voluntary payment of money, without expectation of some benefit, does not constitute, extortion.

Finally, to prove extortion under color of official right, the government need not establish that the defendant actually possessed authority over the passage of the legislature in question.

***

It is not necessary that the government prove in this case that the defendant misused his public office in the sense that he granted some benefit or advantage to the person or persons, here the unlicensed doctors, who allegedly paid him money. Though the unlicensed doctors may have gotten no more than their due in the defendant's performance of his official duties, the defendant's receipt of money, if you find that to have occurred, for the performance of such acts is a misuse of office. Whether a public official accepts a payment for an implicit promise of fair treatment, if any such promise there were, there is an inherent threat that without the payment, the public official would exercise his discretion in an adverse manner. A claim that a public official's actions would have been the same whether or not he received the alleged payments is, for this purpose, irrelevant and is

no defense to the charges contained in counts one through five of this indictment.

So, it is not necessary that the government prove that the defendant committed or promised to commit a quid pro quo, that is, consideration in the nature of official action in return for the payment of money not lawfully owed. Such a quid pro quo may, of course, be forthcoming in an extortion case or it may not. In either event it is not an essential element of the crime.

It is not illegal, in and of itself, for an elected legislator to solicit or accept campaign contributions on behalf of himself or other legislators from individuals who have a special interest in pending legislation. The solicitation or receipt of such contributions violates the federal extortion law -- and that's what we're concerned with, the federal extortion law -- only when the payment is wrongfully induced under color of official right.

***

The mere solicitation or receipt of such political contributions is not of itself illegal.

***

It would not be illegal, in and of itself, for Mr. McCormick to solicit or accept political contributions from foreign doctors who would benefit from this legislation.

In order to find Mr. McCormick guilty of extortion, you must be convinced beyond a reasonable doubt that the payment alleged in a given count of the

indictment was made by or on behalf of the doctors with the expectation that such payment would influence Mr. McCormick's official conduct, and with knowledge on the part of Mr. McCormick that they were paid to him with that expectation by virtue of the office he held. [Tr. Vol. 8, pp. 1239-44].

II. ELEMENTS OF TAX CHARGE

The court instructs you that the question of materiality of the allegedly false statements made in connection with the signing of the tax return is a question of law for the court. The court further instructs you that if you find that the defendant willfully failed to report all of his taxable income as stated in the indictment, then I instruct you that such failure to report all of his taxable income is a material matter under the law. In this regard, the United States does not have to show that the defendant failed to report any particular amount of taxable income, but, rather, that the defendant failed to report some taxable income as alleged in the indictment.

Count six charges that the defendant willfully filed a false income tax return for the year 1984 by failing to declare as taxable income the 4300 dollars he allegedly received in that year from John Vandergrift and Dr. Manuel.

Even if you believe that Mr. McCormick was given all or part of the money, if the money was purely a gift without expectation of benefit, or if it constituted voluntary political contributions, it was not taxable income and Mr. McCormick's failure to report it on his tax return was not illegal.

A contribution voluntarily made for the specific purpose of financing a political candidate's campaign is not necessarily income to the candidate. However, if and when that candidate converts such contributions to his personal use, that is, for any purpose other than meeting campaign expenses, that portion so used then becomes income to the candidate and, as such, is subject to taxation and must be properly reported.

Therefore, if you find from the evidence believe -- that is, if you from the evidence believe all or any part of the moneys allegedly transferred in this case were campaign contributions, you must further be convinced beyond a reasonable doubt that the defendant converted such contributions to his personal use before you may find that those contributions were taxable income of his.

Remember, only that portion of any campaign contribution that you are convinced beyond a reasonable doubt the defendant converted to his personal use is taxable income to him.

To convert to his own use in this case means to use or hold for any purpose other than meeting legitimate campaign expenses.

Where a political gift is received by an individual or a political organization and it is held or used for present or future expenses of a political campaign or for similar purposes, it is not taxable income to the recipient.

In order to constitute nontaxable political contributions, the payments must have been made for one or more of the following purposes:

One, utilized for generally recognized campaign expenses, regardless of when such expenses were incurred, or

Two, used to reimburse the political candidate for out-of-pocket campaign expenses paid by him during a current campaign, or, if he is not currently campaigning, during his last previous campaign.

In determining whether a particular payment represents a nontaxable political contribution, it does not matter whether or not the payment may have violated some state election law, although the fact that the payment is found to have violated some local election law may be taken into account for such value as it may have, if any, on the issue of intent. [Tr. Vol. 8, pp. 1246-49].

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
AUG 20 1990
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CLERK

(3)

No. 89-1918

In the Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT L. MCCORMICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to show that petitioner, an elected public official, committed extortion under color of official right.

2. Whether the court of appeals used an impermissibly vague standard in distinguishing between bona fide campaign contributions and unlawful payoffs to public officials.

3. Whether the evidence was sufficient to support petitioner's conviction for filing a false personal income tax return.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1918

ROBERT L. MCCORMICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 896 F.2d 61.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1990. A petition for rehearing was denied on March 7, 1990. The petition for a writ of certiorari was filed on June 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the Southern District of West Virginia, petitioner, a state legislator, was convicted of extortion under color of official right, in violation of the Hobbs Act, 18 U.S.C. 1951; and of filing a false income tax return, in violation of 26 U.S.C. 7206(1). He was sentenced to three years' probation, fined $50,000, and ordered to pay restitution of $900 and prosecution costs of $1,647.50. The court of appeals affirmed.

1. In 1984, petitioner was a member of the West Virginia House of Delegates. He represented an economically depressed coal mining region that has long suffered from a shortage of medical personnel. To help alleviate the problem, West Virginia legislation had for some time allowed foreign medical school graduates who had not met the State's medical licensing requirements to practice medicine under a "temporary permit" while studying to pass the state licensing examinations. Some temporary-permit doctors had repeatedly failed the examinations. Petitioner was a supporter of the temporary-permit system. Pet. App. 3-4.

During the 1980s there was a movement in the House of Delegates to end the temporary-permit system. A number of temporary-permit doctors formed the Coalfield Health Care Association to lobby for favorable legislation. Dr. Ernesto Manual was the leader of the Association. The Association hired a lobbyist, John Vandergrift, to represent the doctors' interests in the state capital. Pet. App. 4-5.

In the course of the 1984 West Virginia legislative session, petitioner sponsored legislation urged by the Association to extend the temporary-permit system for one year. That legislation passed on the last day

of the regular session of the legislature. Shortly thereafter, petitioner agreed with Vandergrift to sponsor additional legislation, to be introduced during the 1985 session, which would grant permanent medical licenses to the temporary-permit doctors. Pet. App. 5.

During his 1984 reelection campaign, petitioner complained to Vandergrift that the campaign was expensive, that he had not "heard from" the doctors, and that he wanted to know what Vandergrift was going to do about it. Pet. App. 6, 35; Tr. 167-168. Vandergrift testified that petitioner was unfriendly and used a "very rough" tone of voice during their conversation. Pet. App. 36; Tr. 168, 282. In response to petitioner's question, Vandergrift said he would get in touch with Dr. Manual "and see what I could do." Tr. 168. Vandergrift testified that he decided petitioner's request should be accommodated because he "wanted [petitioner's] continued support for the legislation that was coming up next year," Tr. 276, and "would not take the risk to not give it to him." Pet. App. 36; Tr. 281.

Vandergrift conveyed petitioner's request for money to the doctors. On June 1, 1984, Manual gave Vandergrift an envelope for petitioner containing nine $100 bills, which petitioner accepted at his business office. Petitioner's receipt of the $900 provided the basis for the Hobbs Act count on which he was convicted. Pet. App. 6. The government's evidence showed that following the primary election, the unlicensed physicians made three more cash payments to petitioner. *Id.* at 6-7.

Petitioner sponsored the favorable licensing legislation in the spring of 1985 and spoke at length in support of it during floor debates. The bill passed

the House of Delegates and ultimately became law.[1] Pet. App. 7. Two weeks after the bill was enacted, according to the government's evidence, petitioner received the last of the series of cash payments from Dr. Manual. *Ibid.*

In spite of the enactment of the licensing bill, several of the doctors, including Dr. Manual, were denied licenses by the Medical Licensing Board. Vandergrift subsequently contacted petitioner and said petitioner would have to make an appearance at the next board meeting, and "in order to get the board to change their mind and back up on the decision, he would have to intimidate the hell out of them." Tr. 185. Petitioner appeared at the hearing and made a presentation; as a result of the hearing, Dr. Manual and several of the other unlicensed doctors obtained permanent licenses. Tr. 185-187.

The following year, Vandergrift asked petitioner whether another politician should solicit funds from the formerly unlicensed physicians. Vandergrift testified that petitioner responded by saying that "the doctors had taken good care of him and the debt was paid." Tr. 189.

Neither the doctors nor petitioner treated the $900 payoff as a campaign contribution. Petitioner did not report it on his campaign books. The Association kept a record of the payments it made to petitioner, but the Association's records did not identify those

[1] The government's evidence showed that petitioner received a second cash delivery of $2,000 from the doctors on June 1, 1984, and four more cash payments on November 1, November 12, December 19, 1984, and May 15, 1985. Pet. App. 6-7. Each of those payments except the November 12 payment was separately charged as a Hobbs Act violation, but the jury was unable to reach a verdict on those counts. *Id.* at 8.

payments as campaign contributions, and the Association used a code to disguise the fact that petitioner was the recipient. Pet. App. 7-8.

2. In September 1988, a federal grand jury returned an indictment charging that petitioner had extorted payments under color of official right and that he had failed to report the payments he had received on his income tax return. Pet. App. 8. The defense theory at trial was that the payments were campaign contributions. Although the payments were concededly not made in accordance with the provisions of West Virginia law governing campaign contributions, petitioner argued that that did not change their character as campaign contributions rather than payoffs made in response to pressure from petitioner. Tr. 1134-1135.

The jury was thoroughly and carefully instructed respecting the elements of extortion under color of official right. Pet. App. 49-54. The instructions focused on the requirements that the public official be proved to have made "wrongful use of his office to obtain money not due to him or his office" and that the public official know when receiving the money that the improper objective was motivating the benefactor to make the payment. *Id.* at 50-54.

The district court explained that the mere solicitation of political contributions from individuals who have a special interest in pending legislation is not unlawful. Pet. App. 53. In particular, the court instructed the jury that political contributions do not constitute unlawful payments simply because the contributions are made by persons who, as the official knows, "are motivated by a general gratitude toward him because of his position on certain issues important to them, or even in the hope that the good will

generated by such contributions will make the official more receptive to their cause." *Id.* at 54. The solicitation or receipt of such contributions violates the federal extortion law "only when the payment is wrongfully induced under color of official right," *id.* at 53, that is, when the public official accepts the payment knowing that it is made with the expectation that the payment will affect the public official's conduct in a particular way. As the district court explained, *ibid.*,

> [i]n order to find [petitioner] guilty of extortion, you must first be convinced beyond a reasonable doubt that the payment alleged in a given count in the indictment was made by or on behalf of the doctors with the expectation that such payment would influence [petitioner's] official conduct, and with the knowledge on the part of [petitioner] that they were paid to him with that expectation by virtue of the office he held.

It was not necessary, the court instructed, for the government to prove that the defendant misused his public office by granting some actual benefit or advantage to the persons who paid him the money. Even if the unlicensed doctors got "no more than their due in the defendant's performance of his official duties," his receipt of money "for the performance of such acts" would be unlawful. Pet. App. 54. The court explained that

> [w]hen a public official accepts the payment for an implicit promise of fair treatment, if any such promise there were, there is an inherent threat that without the payment, the public official would exercise his discretion in an adverse manner. A claim that a public official's actions would have been the same whether or not he received the alleged payments is, for this purpose, irrelevant and is no defense to the charges contained in * * * the indictment.

Ibid. For that reason, the court stated, "it is not necessary that the government prove that the defendant committed or promised to commit a *quid pro quo*, that is, consideration in the nature of official action in return for the payment of money not lawfully owed." *Ibid.*

3. The court of appeals affirmed. It held that "[i]f the payments were 'induced under color of official right' and paid to preserve [petitioner's] support of [the licensing bill], then the money violated the Hobbs Act." Pet. App. 11. On the other hand, "[i]f the money was a voluntary campaign contribution, then [petitioner] is guilty only of violating state election laws." *Ibid.*

Quoting *United States* v. *Dozier*, 672 F.2d 531, 537 (5th Cir.), cert. denied, 459 U.S. 943 (1982), the court of appeals noted that "a public official may not demand payment as inducement for the promise to perform (or not to perform) an official act." Pet. App. 14. The court observed that such *quid pro quo* exchanges are "persuasive evidence that the money was extorted in violation of the Hobbs Act." *Id.* at 16. In addition, however, the court noted (*ibid.*) that

> if [the] payments to elected officials are not treated as legitimate campaign contributions by either the payor or the official, then a jury may reasonably infer that these payments are also induced by the official's office in violation of the Hobbs Act.

Otherwise, the court explained, "unless there was an explicit *quid pro quo* promise, elected officials could avoid the Hobbs Act merely by calling the money

'campaign contributions.' In this situation, the actual intent of the parties is the key determining factor." *Ibid.*

The court held that in the circumstances of this case, "a reasonable jury could find that [petitioner] was extorting money from the doctors for his continued support of the 1985 legislation. Further, the evidence supports the conclusion that the money was never intended by any of the parties to be a campaign contribution." Pet. App. 20. Because petitioner's only defense to the offense of filing a false income tax return was his claim that the money was not personal income but rather was a contribution to his reelection campaign, the court likewise affirmed the tax fraud conviction. *Id.* at 20-21.

ARGUMENT

1. Petitioner asserts that the $900 payment he received from the unlicensed doctors was merely a campaign contribution. From that premise, he argues that his Hobbs Act conviction must be overturned because the jury was not instructed that it had to find that there was a *quid pro quo* agreement that he would perform particular services in exchange for the money. Pet. 22-39.

As the court of appeals held, the jury was properly instructed on the elements of the Hobbs Act, and the evidence was sufficient to justify the jury's conclusion that petitioner was "extorting money from the doctors for his continued support of the 1985 legislation." Pet. App. 20. While the jury was told that it did not have to find an explicit *quid pro quo* agreement on petitioner's part to perform particular services in exchange for the money, no such explicit *quid pro quo* was necessary; it was enough that petitioner

induced the payment to be made by exploiting the fears of the foreign doctors that absent the payment petitioner might not continue to support the licensing legislation. Thus, as the district court put the point in the jury instructions (*id.* at 54),

> [t]hough the unlicensed doctors may have gotten no more than their due in the defendant's performance of his official duties, the defendant's receipt of money, if you find that to have occurred, for the performance of such acts is a misuse of office.

The court of appeals was correct in rejecting petitioner's claim that the payment was a bona fide campaign contribution and therefore was not subject to the Hobbs Act. The manner in which the payment was solicited and paid, and the manner in which both parties concealed and failed to report the payment as a campaign contribution strongly suggests that neither the doctors nor petitioner regarded the payment as a bona fide campaign contribution, rather than a payoff for a particular anticipated service. Pet. App. 18, 19. That fact was underscored by the timing of the last payment in the series, which was made long after the election, and only two weeks after the licensing legislation was passed.[2] Finally, petitioner's after-the-fact comment about the payments is revealing with respect to the claim that the $900 payment was simply a campaign contribution: he commented that "the doctors had taken good care of him and the debt was paid." Tr. 189. In sum, it is true that the

[2] Although the jury was unable to reach a verdict on the counts relating to the payments made in November and December 1984 and May 1985, the evidence relating to those payments may be considered in determining the understanding of the parties as to the nature of the payments.

payment may have been used to support petitioner's campaign or at least reimburse him for his own campaign expenditures. But that does not render it a bona fide campaign contribution; a bribe or payoff does not become a bona fide campaign contribution simply because the recipient decides to use the funds to defray campaign expenses.

Petitioner's inducement of the payment as consideration for his assistance on the licensing legislation was sufficient to render the payment unlawful even if it was made for the purpose of offsetting petitioner's campaign expenses. Contrary to petitioner's assertion, the court of appeals did not uphold petitioner's conviction simply on the theory that the motivation for the payment focused on petitioner's office. Rather, the court of appeals found that the evidence was sufficient to show that petitioner "was extorting money from the doctors for his continued support of the 1985 legislation." Pet. App. 20. In light of the jury instruction requiring a finding that the defendant received money "for the performance of" his official duties, *id.* at 54, it is clear that the jury convicted, and the court of appeals affirmed, on the theory that petitioner did more than simply accept money paid to him because of his official position. At minimum, petitioner induced the doctors to pay him money by making an implicit promise of fair treatment, a promise that carried with it the "inherent threat that without the payment, [petitioner] would exercise his discretion in an adverse manner." *Ibid.* And that form of coercion constitutes extortion under color of official right under any test.

To be sure, the district court instructed the jury that it was "not necessary that the government prove that the defendant committed or promised to commit a quid pro quo, that is, consideration in the nature

of official action in return for the payment of money not lawfully owed." Pet. App. 54. In context, however, that instruction simply meant that it was unnecessary for the government to prove an express promise by petitioner to continue to support the licensing legislation in exchange for a payment from the doctors. In light of the court's other instructions, see *id.* at 53, 54, the jury could not have understood the "quid pro quo" instruction as relieving the government of its burden of showing that petitioner received the money "for the performance of" his official duties.

Petitioner claims (Pet. 24-36) that the decision in this case conflicts with decisions from other circuits. He cites cases from the Sixth and Eleventh Circuits that contain language suggesting that in order to avoid criminalizing political contributions, the government must show a *quid pro quo* exchange in Hobbs Act cases involving elected public officials. See *United States* v. *Bibby*, 752 F.2d 1116, 1127 n.1 (6th Cir. 1985), cert. denied, 475 U.S. 1010 (1986); *United States* v. *Haimowitz*, 725 F.2d 1561, 1573 (11th Cir.), cert. denied, 469 U.S. 1072 (1984). In this case, however, the evidence *did* show a *quid pro quo*, as the court of appeals observed: the evidence showed that petitioner had extorted the $900 payment from the unlicensed doctors "for his continued support of the 1985 legislation." Pet. App. 20. Even if the statements in *Bibby* and *Haimowitz* were read to require a *quid pro quo* in all Hobbs Act prosecutions of elected public officials, this case would satisfy that requirement.

In any event, it is clear that the *quid pro quo* requirement is applicable, at most, to payments that can fairly be characterized as bona fide campaign contributions. The *Bibby* court referred to the need

to prove a *quid pro quo* in the context of political contributions, see 752 F.2d at 1127 n.1, and the *Haimowitz* court expressly premised its discussion of the *quid pro quo* requirement on the fact that a campaign contribution was involved. Thus, while the court in *Haimowitz* reversed the defendant's conviction on one count because it involved the solicitation of a campaign contribution, the court affirmed another Hobbs Act conviction for receiving a personal payoff without referring to the requirement of proof of a specific *quid pro quo*. 725 F.2d at 1572-1573, 1576-1577. In this case, as the court of appeals observed, the $900 payment "was never intended by any of the parties to be a campaign contribution." Pet. App. 20. The language from *Bibby* and *Haimowitz* pertaining to the treatment of bona fide campaign contributions is therefore inapposite here.[3] The other cases cited by petitioner (Pet. 34-35) each involved a *quid pro quo*, but they do not stand for the proposition that proof of a *quid pro quo* is required in all cases, and they certainly do not conflict with the decision in this case, in which the court of appeals found more than simply the passive receipt of money paid because of the official's public office.

---

[3] The Ninth Circuit's decision in *United States* v. *Egan*, 860 F.2d 904 (1988), is also unhelpful to petitioner. The court in that case held that "to be guilty of extortion, rather than mere acceptance of a bribe, the public official must do something beyond merely accepting an unsolicited payment. * * * He must communicate to members of the public that favors are for sale." 860 F.2d at 907. That is an accurate description of what happened in this case, as the court of appeals analyzed the evidence. Petitioner did not "merely accept[] an unsolicited payment," but solicited funds in exchange for his continued support of legislation of great importance to the unlicensed doctors.

2. Petitioner claims (Pet. 40-46) that the court of appeals articulated an impermissibly vague standard for differentiating between bona fide campaign contributions and personal payoffs that merely purport to be campaign contributions. The court of appeals' discussion of this issue, however, was entirely appropriate. The court made the point that whether a payment is a campaign contribution or simply a payoff dressed up to look like a campaign contribution is essentially a question of the intent of the parties; that intent, in turn, can be discerned by consulting various factors, such as the form and method by which the parties make the payment, the way they treat it in their accounts, and whether the payment is linked to some form of official action on the public's part. The multi-factor test that the court of appeals offered as guidance to determining intent is neither vague nor objectionable. In any event, the factors that the court set forth are not a formula to be applied rigidly in every case, but simply a collection of common-sense guides to making a factual determination on the ultimate question of intent.

3. Petitioner also contends (Pet. 47-51) that the court of appeals employed an erroneous standard for determining when a campaign contribution is converted to personal use for income tax reporting purposes.

The jury was instructed (Pet. App. 57) that petitioner did not have to report as taxable income the payments from the unlicensed doctors if it concluded that the money was either a gift made without expectation of benefit, or a voluntary political contribution. The jury verdict of guilty constituted a finding that the payments were neither a gift nor a voluntary political contribution, but the products of extortion.

Petitioner argues that because the evidence did not show that the money he received from the doctors was diverted from campaign activities to personal uses, it does not constitute taxable income. That argument, however, is premised on the assumption that the payments were bona fide political contributions in the first place. Money that is obtained in some other fashion, such as through extortion, does not lose its character as taxable income simply because it is used to pay campaign expenses (or, as applied to this case, because the government is unable to prove that it was *not* used for campaign purposes). Accordingly, the jury's finding that the money petitioner received from the unlicensed doctors was the product of extortion disposes of petitioner's argument that it was error for the jury to find petitioner guilty of filing a false tax return for failing to report that payment as income.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

AUGUST 1990

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JOINT

APPENDIX

No. 89-1918

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

ROBERT L. McCORMICK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

JOINT APPENDIX

*Rudolph L. Di Trapano
Rebecca A. Baitty
Di Trapano & Jackson
604 Virginia Street, East
Charleston, West Virginia
25301
(304) 342-0133

Counsel for Petitioner
*Counsel of Record

Kenneth W. Starr
Solicitor General

Edward S.G. Dennis, Jr.
Assistant Attorney General

Richard A. Friedman
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

Counsel for Respondent

PETITION FOR CERTIORARI FILED JUNE 5, 1990
CERTIORARI GRANTED OCTOBER 1, 1990

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For the Fourth Circuit, 896 F.2d 61 (1990)
(Reproduced in Petition For
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not reproduced in Joint Appendix)

Order of the United States Court of Appeals
For the Fourth Circuit, denying Petitioner's
Petition for Rehearing and Suggestion for
Rehearing En Banc
(Reproduced in Petition For
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not reproduced in Joint Appendix)

RELEVANT DOCKET ENTRIES

DATE	DOCUMENT NO	V. PROCEEDINGS
1988		
Sep 09	1	INDICTMENT (Offenses occurred June 1984 – May 1985)
Sep 12	2	GRAND JURY ORDER (25KC) returns made in Blfd.
Oct 06	7	ORDER (25BB): arrt held 9/22/88; deft entered P/NG to indict; trial set for 11/21/88 at 9:30 in Chas; ptns due 10/6/88; rspns due 10/13/88; hrg on mtns 10/25/88 at 1:15 in Chas; rlsg deft on $10,000 NS bond w/sp cond. cc: Judge, deft, atys, USM & USP. (EOD 10/6/88)
Oct 26	26	ORDER (2508): hrg held 10/25/88; incorporating court's rulings on mtns by reference; trial cont until 9:30 on 11/28/88; voir dire due 11/23/88; clerk to furnish copies of jury quest. cc: Judge, deft, atys, USM & USP. (EOD 11/3/88)
Nov 23	*	PROPOSED INSTRUCTIONS by govt.
Nov 23	*	PROPOSED INSTRUCTIONS by deft.
Dec 02	27	TRANSCRIPT of July trial opng stmts on behalf of deft on 11/28/88.

Dec 05	**	PROPOSED jury instructs by deft.
Dec 07	28	JURY VERDICT: GUILTY as to ct. 1 and ct 6; NO VERDICT as to cts 2, 3, 4 and 5.
Dec 09	29	ORDER (2508): filing attached written comm between court and jury.
Dec 09	30	ORDER (2508): Trial held Nov 28, 29 and 30, and Dec 1, 2, 5, 6 and 7, 1988; filing jury's verdict of GUILTY as to cts 1 & 6; declaring MISTRIAL as to cts 2-5; USP to conduct PSI report; final disp set for 2/8/89; post-trial mtns due 12/16/88; contin deft's bond. cc: Judge, deft, atys, USM & USP.
Dec 13	31	NOTICE by govt that they elect not to proceed on cts 2, 3, 4 & 5 in this case.
Dec 16	32	NOTICE OF APPEAL by deft; appealing jdgmt of conviction on 12/7/88.

1989

Feb 09	36	JUDGMENT AND PROBATION ORDER (2508): Deft shall make restitution to the victim of ct 1 for s total of $900, payable on or before April 10, 1989; Deft shall pay a total fine of $50,000, payable on or before April 10, 1989. Deft shall pay costs of prosecution totalling $1,647.50, payable before Feb. 18, 1989; $50 monetary assessment, placed on 3 yrs probation. cc: attys, deft, USMS, USP, Judge (EOD 02-13-89)
Feb 21	40	MOTION by deft re: putting monies of deft into court registry.
Feb 28	41	ORDER (2508): purs to Rule 38(a)(3), payment of rest, fine and costs of pros is stayed pending final disp of deft's appeal; deft shall, w/in 10 days pay rest, fine & costs of pros to be deposited by Clerk in interest-bearing savings accountor CD w/ One Valley Bank, Charleston, WV or in U.S. T-Bills, and the principal applied toward rest, etc. in the event the appeal is affirmed, and the int shall be received by USA in addtn to principal.; if deft's appeal is not affirmed, deft shall receive principal and int. cc: Judge, deft, atys, USM & USP & Mike Relihan, Chief Deputy. (EOD 3/9/89)

Mar 07	42	TRANSCRIPT – MASTER INDEX to Jury trial on 11/28/88 thru 12/7/88. (Steinke)
Mar 07	43	TRANSCRIPT – VOLUME 2 (Steinke) trial on 11/28/88.
Mar 07	44	TRANSCRIPT – VOLUME 3 (Steinke) trial on 11/29/88.
Mar 07	45	TRANSCRIPT – VOLUME 4 (Steinke) trial on 11/30/88.
Mar 07	46	TRANSCRIPT – VOLUME 5 (Steinke) trial on 12/01/88.
Mar 07	47	TRANSCRIPT – VOLUME 6 (Steinke) trial on 12/02/88.
Mar 07	48	TRANSCRIPT – VOLUME 7 (Steinke) trial on 12/05/88.
Mar 07	49	TRANSCRIPT – VOLUME 8 (Steinke) trial on 12/06/88.
Mar 07	50	TRANSCRIPT – VOLUME 9 (Steinke) trial on 12/07/88.
Apr 25	52	ORDER (2508): directing Clerk to supplement previously transmitted case to include deft's jury instructs. cc: Judge, deft, atys, USM & USP & appeals clerk.
Apr 25	53	PROPOSED DEFT JURY INSTRUCTIONS.
1990		
Feb 14	54	PER CURIAM OPINION of USCA – affirming convictions.
Mar 15	55	MANDATE from USCA affirming District Court's decision; filed in USCA 2/12/90.

Mar 23	56	MOTION by Govt for an Order Directing Clerk to Disburse Funds.
04-13-90	57	MOTION by deft to continue stay of restitution.
06-18-90	58	NOTICE by USCA of Filing of Petition for Certiorari.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
SEPTEMBER 8, 1988, GRAND JURY
SESSION BLUEFIELD

UNITED STATES OF AMERICA	Criminal No. 2:88-00220
v.	18 U.S.C. § 1951
ROBERT L. McCORMICK	18 U.S.C. § 2
	26 U.S.C. § 7206(1)

INDICTMENT

(Filed September 9, 1988)

The Grand Jury Charges:

COUNTS ONE THROUGH FIVE
(Extortion 18 U.S.C. § 1951)

A. At all relevant times, defendant ROBERT L. McCORMICK was resident of Logan, Logan County, West Virginia and an elected member of the House of Delegates of the State of West Virginia, representing the 16th District, which District included Logan County, West Virginia.

B. At all relevant times, members of the House of Delegates of the State of West Virginia, including defendant ROBERT L. McCORMICK, were required, under penalty of forfeiture of office, to serve in accordance with the following oath:

> I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of West Virginia, and faithfully discharge the duties of Delegate, according to the best of my ability; that I will not accept or receive, directly or indirectly, any money or other valuable thing, from any

> corporation, company, or person, for any vote or influence I may give or withhold as Delegate on any bill, resolution or appropriation, or for any act I may do or perform as Delegate. So help me God.

C. At all relevant times, defendant ROBERT L. McCORMICK, as a duly elected representative of the citizens of the State of West Virginia, that is, a member of the West Virginia House of Delegates, was charged with the duty, responsibility and obligation to represent the citizens of the State of West Virginia, in accordance with his oath of office, in a conscientious, loyal, honest, faithful, disinterested and unbiased manner: 1) in the public interest; 2) in compliance with the laws of the United States and West Virginia; and 3) free from partiality, deceit, bribery and corruption.

D. At all relevant times, defendant ROBERT L. McCORMICK served as a member of the Committee on Health and Welfare (hereinafter referred to as the "Health Committee") of the West Virginia House of Delegates.

E. At all relevant times, the Health Committee was responsible for, among other duties under the law of the State of West Virginia, matters concerning: 1) public health and welfare of the citizens of West Virginia and 2) hospitals serving the citizens of West Virginia.

F. At all relevant times, the West Virginia Board of Medicine (hereinafter referred to as the "Board of Medicine") was responsible for, among other duties under the law of the State of West Virginia, protecting the public interest in ensuring that licenses to practice medicine and surgery in West Virginia (hereinafter referred to as "medical licenses") were issued to those applicants, and only

those applicants, who were qualified, inasmuch as the practice of medicine and surgery is a privilege and not a right.

G. At all relevant times, the Board of Medicine was responsible for, among other duties under the law of the State of West Virginia, matters concerning: 1) prescribing the qualifications entitling a physician to the privilege of practicing medicine and surgery in West Virginia; 2) prescribing the medical competency examination to be given to a medical school graduate in order to determine whether or not such graduate was so qualified; 3) causing the evaluation of the administered examinations; 4) issuing West Virginia medical licenses to graduates who passed medical competency examinations; and 5) issuing temporary permits to practice medicine and surgery (hereinafter referred to as "temporary permits") to eligible foreign medical school graduates who did not pass such examinations.

H. At all relevant times, in order to be eligible to receive a medical license, the Board of Medicine required a medical school graduate, to pass, that is, to obtain a miminum score of 75, on the Federation Licensing Examination (hereinafter referred to as the "FLEX"), a nationally standardized examination prescribed for physician licensure by all medical licensing jurisdictions throughout the United States.

I. At all relevant times, in order to be eligible to receive a medical license, the Board of Medicine required a foreign medical school graduate, that is, a doctor whose basic medical degree was conferred by a medical school outside the United States (including Puerto Rico) and

Canada (hereinafter referred to as "foreign doctor"), to pass the FLEX and, in addition, to fulfill the requirements of the Education Commission for Foreign Medical Graduates (hereinafter referred to as the "ECFMG"), which included: 1) successful completion of certain prescribed educational requirements; 2) passing the ECFMG examination, Visa Qualifying Examination or FLEX; and 3) passing the ECFMG English test.

J. At all relevant times prior to July 1, 1982, under the law of West Virginia, foreign doctors who had failed to pass the prescribed examinations were permitted to practice medicine and surgery in West Virginia pursuant to temporary permits issued by the Board of Medicine.

K. At all relevant times prior to July 1, 1982, each foreign doctor holding such temporary permit was eligible to obtain a new temporary permit each year so long as the foreign doctor took the FLEX at least once each year, regardless of whether the doctor passed or failed.

L. At all relevant times after July 1, 1982, foreign doctors holding temporary permits were subject to losing their temporary permits due to a change in the law of West Virginia, which change caused said foreign doctors to fear they would be unable to continue to earn their living through the practice of medicine and surgery.

M. In approximately February, 1983, foreign doctors holding temporary permits made an unsuccessful effort to have the West Virginia Legislature pass a law providing that such doctors would be eligible immediately to obtain permanent medical licenses even though those doctors had failed to pass the examinations required by the Board of Medicine.

N. In approximately January, 1984, defendant ROBERT L. McCORMICK, in his capacity as a public official, that is, as a member of the West Virginia House of Delegates and its Health Committee, agreed to sponsor legislation which was favorable to the foreign doctors holding temporary permits, that is, legislation which would enable such doctors to obtain medical licenses or otherwise permit such doctors to continue practicing medicine and surgery.

O. On or about June 1, 1984, and November 1, 1984, defendant ROBERT L. McCORMICK extorted, as that term is defined under Title 18, United States Code, Section 1951(b)(2), three (3) cash payments totaling approximately Three Thousand Seven Hundred Dollars ($3,700) directly and indirectly from the foreign doctors holding temporary permits who were attempting to obtain medical licenses.

P. On or about November 12, 1984, defendant ROBERT L. McCORMICK, as a public official, that is, as a member of the West Virginia House of Delegates and its Health Committee, appeared before the Board of Medicine meeting in Charleston, West Virginia, and corruptly exercised his influence in an effort to obtain action by the Board of Medicine beneficial to the foreign doctors holding temporary permits who were attempting to obtain medical licenses.

Q. On or about December 19, 1984, defendant ROBERT L. McCORMICK extorted, as that term is defined under Title 18, United States Code, Section 1951(b)(2), a cash payment of approximately Six Hundred Dollars ($600.00) directly and indirectly from the foreign

doctors holding temporary permits who were attempting to obtain medical licenses.

R. On or about February 25, 1985, during the 1985 regular session of the Legislature of the State of West Virginia at the State Capitol in Charleston, West Virginia, defendant ROBERT L. McCORMICK, as a public official, that is, as a member of the West Virginia House of Delegates and its Health Committee, corruptly exercised his influence and introduced legislation to the House of Delegates, including House Bill 1431, beneficial to the foreign doctors holding temporary permits who were attempting to obtain medical licenses.

S. House Bill 1431, in its original form, provided that a foreign doctor who had failed to pass the FLEX, that is, failed to obtain a minimum score of 75, was, nevertheless, eligible to immediately obtain a permanent medical license, inasmuch as the doctor was to be allowed credit of one point toward the examination score for every year the doctor had held a temporary permit in West Virginia, up to a maximum of ten points for ten years practice, that is, a foreign doctor who had achieved a failing score as low as 65 on the FLEX was eligible to receive a permanent medical license under this bill.

T. On or about March 7, 1985, House Bill 1431 in its original form was rejected.

U. On or about March 8, 1985, defendant ROBERT L. MCCORMICK, as a public official, that is, as a member of the West Virginia House of Delegates and its Health Committee, corruptly exercised his influence and caused the Committee Substitute for House Bill 1431 to be presented to the House of Delegates.

V. The Committee Substitute for House Bill 1431 provided that a foreign doctor who had failed to pass the FLEX was, nevertheless, eligible to immediately obtain a permanent license, inasmuch as the doctor was to be allowed credit of one point toward the examination score for every year the doctor had held a temporary permit in West Virginia, up to a maximum of five points for five years of practice, that is, a foreign doctor who had achieved a failing score as low as 70 on the FLEX was eligible to receive a permanent medical license under this bill.

W. On or about March 13, 1985, the Committee Substitute for House Bill 1431 was passed by the West Virginia House of Delegates.

X. On or about April 13, 1985, the Committee Substitute for House Bill 1431 was presented to and, although opposed by the West Virginia State Medical Association, passed by the West Virginia Senate.

Y. On or about May 2, 1985, the Committee Substitute for House Bill 1431 was signed by the Governor of the State of West Virginia and became law, effective April 13, 1985.

Z. On or about May 15, 1985, defendant ROBERT L. McCORMICK extorted, as that term is defined under Title 18, United States Code, Section 1951(b)(2), a cash payment of approximately Nine Hundred Fifty Dollars ($950.00) directly and indirectly from the foreign doctors holding temporary permits who were attempting to obtain medical licenses.

AA. On or about June 25, 1985, the Board of Medicine denied the applications for medical licenses submitted by certain foreign doctors holding temporary permits who, although achieving a score of 70 or more on the FLEX and obtaining credit for additional points in accordance with the provisions of the Committee Substitute for House Bill 1431 the foreign doctors still could not meet the licensing requirements under West Virginia law since said foreign doctors failed to meet the requirements of the ECFMG.

BB. On or about July 8, 1985, defendant ROBERT L. McCORMICK, as a public official, that is, as a member of the West Virginia House of Delegates and its Health Committee, appeared before the Board of Medicine meeting in Charleston, West Virginia, and corruptly exercised his influence in an effort to obtain action beneficial to the foreign doctors holding temporary permits whose applications for medical licenses had been denied by the Board of Medicine on June 25, 1985.

CC. On or about the dates set forth below, defendant ROBERT L. McCORMICK, at or near Logan, Logan County, and Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, did affect and attempt to affect interstate commerce by extortion, in that, defendant ROBERT L. McCORMICK did obtain property in the form of cash payments in the following approximate amounts, not due either him or his office, directly and indirectly, from foreign doctors holding temporary permits, with their consent, induced under the color of official right:

COUNT	AMOUNT OF CASH	DATE
COUNT ONE	$900.00	June 1, 1984
COUNT TWO	$2,000.00	June 1, 1984
COUNT THREE	$800.00	November 1, 1984
COUNT FOUR	$600.00	December 19, 1984
COUNT FIVE	$950.00	May 15, 1985

ALL IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTIONS 1951(a) AND 2.

COUNT SIX

(Subscribing a False Tax Return) 26 U.S.C. § 7206(1)

That on or about April 23, 1985, in the Southern District of West Virginia, defendant ROBERT L. McCORMICK, a resident of Logan, Logan County, West Virginia, did willfully make and subscribe a U.S. Individual Income Tax Return, Form 1040, which was verified by a written declaration that it was made under the penalties of perjury and which was filed with the Director, Internal Revenue Service Center, at Memphis, Tennessee, which said U. S. Individual Income Tax Return, Form 1040, defendant ROBERT L. McCORMICK did not believe to be true and correct as to every material matter in that the said 1984 U. S. Individual Income Tax Return, Form 1040, reflected Fifty-Two Thousand Eight Hundred Forty-Five Dollars ($52,845) of taxable income, with a tax due to Twelve Thousand Forty-Six Dollars ($12,046), whereas, as defendant ROBERT L. McCORMICK then and there well knew and believed, the correct taxable income was approximately Fifty-Seven Thousand One Hundred

Forty-Five Dollars ($57,145); in violation of Title 26, United States, Code, Section 7206(1).

A True Bill.

/s/ Roger L. Jones
Foreperson

MICHAEL W. CAREY
United States Attorney

By: /s/ Nancy C. Hill
Assistant United States Attorney

COURT'S INSTRUCTIONS TO THE JURY
December 5, 1988
(Excerpts from Transcript Volume 7)

Court's Instructions to the Jury

* * *

[p. 1181] Now then, with respect to the first five counts of the indictment – and you are going to have the indictment in the jury room with you, keeping in mind, as you are already aware, of course, that it is not evidence. Counts one through five, the so-called extortion counts, allege that on or about five specified dates during 1984 and 1985, that is, one such date in each count, the defendant affected or attempted to affect interstate commerce by using his public office as a member of the West Virginia House of Delegates to extort illegal cash payments from certain foreign doctors holding temporary permits to practice medicine in the state who had failed to pass the required examination and who were attempting to obtain permanent medical licenses.

Each of the five counts alleges an approximate amount of cash was paid directly and indirectly by the foreign doctors or on their behalf to the defendant and that the payments were not due the defendant or his office. Each alleged payment constitutes a separate offense.

Now, before the defendant may be found guilty of the charge contained in counts one through five, the government must prove beyond a reasonable doubt each of the following three essential elements as to each such count:

[p. 1182] 1. That at or near the time and place alleged, the defendant induced a cash payment from foreign doctors, as alleged in such count;

2. That the defendant did so knowingly and willfully by extortion; and

3. That in doing so, the defendant affected or attempted to affect interstate commerce.

Again, the burden is always on the government to establish each of these elements by proof beyond a reasonable doubt. The law never imposes on the defendant in a criminal case the burden of introducing any evidence or calling any witnesses.

Now, a definition of some of the terms used.

Extortion means the obtaining of property from another, with his consent, either induced by the wrongful use of fear or induced under color of official right.

The term "wrongful" means the obtaining of property unfairly and unjustly by one having no lawful claim thereto.

As to inducement, the United States must prove that the defendant induced the person or persons described in the indictment to part with property, a term which includes money. It is charged that the defendant did so under color of official right.

In proving this element, it is enough that the government prove beyond a reasonable doubt that the benefactor [p. 1183] transferred something of significant value, here alleged to be money, to the public official with the expectation that the public official would extend to him

some benefit or refrain from some harmful action, and the public official accepted the money knowing it was being transferred to him with that expectation by the benefactor and because of his office.

In determining whether the defendant induced a person or persons described in the indictment to part with property at the time of the alleged events in counts one and two, occurring as you'll recall on June 1, 1984 as alleged in the indictment and if you believe it as set forth in some of the evidence adduced, you may take into account all the surrounding circumstances, including any word spoken by or actions of the defendant, if any, prior thereto or in connection therewith. In determining whether the defendant induced a person or persons described in the indictment to part with property alleged in counts three, four, and five, you may take into account all the surrounding circumstances, including any course of conduct on the part of the defendant, if any, which may bear thereon.

And so, inducement can be in the overt form of a demand, or in a more subtle form such as custom or expectation such as might have been communicated by the nature of the defendant's prior conduct of his office, if any.

As to color of official right, in this case the [p. 1184] government has charged that extortion was committed under color of official right, in that the defendant is charged with committing extortion by virtue of his office as a member of the West Virginia House of Delegates.

Extortion under color of official right means the obtaining of money by a public official when the money

obtained was not lawfully due and owing to him or to his office.

Extortion under color of official right does not require proof of specific acts by the public official demonstrating force, threats, or the use of fear so long as the victim consented because of the office or position held by the official.

Where, as here, the indictment charges that the alleged extortion was committed under color of official right, the government need not prove that the alleged victim of the extortion, here the unlicensed doctors, was, in fact, in a state of fear at the time the payments in question were made, although they may have been, that is, the evidence may indicate to you conceivably that that is the case, but that, of course, is not of particular moment.

Extortion under color of official right is committed whenever a public officer makes wrongful use of his office to obtain money not due to him or his office. It is the public official's misuse of his office which, by itself, supplies proof of the necessary element of coercion. Therefore, the [p. 1185] wrongful use of official power need not be accompanied by actual or threatened force, violence, or fear.

If the public official knows the motivation of the victim to make any payment focuses on the public official's office, and money is obtained by the public official which was not lawfully due and owing to him or the office he represented, that is sufficient to satisfy the government's burden of showing a misuse of office and extortion under color of official right. The mere voluntary

payment of money, however, does not constitute extortion.

Finally, to prove extortion under color of official right, the government need not establish that the defendant actually possessed authority over the passage of the legislation in question. Similarly, the payments need not have been made directly or ultimately to the public official. It is sufficient if the evidence shows that the victim was induced to deliver money to someone as a result of the defendant's office.

There has been evidence in this case that for some years before 1984, as well as during the 1984 and 1985 legislative session, the defendant was a leading supporter of legislation to permit foreign medical school graduates who did not meet all the medical licensing requirements to practice in areas of West Virginia that needed physicians.

It would not be illegal, in and of itself, for the defendant to solicit or accept political contributions from [p. 1186] foreign doctors who would benefit from this legislation.

In order to find Mr. McCormick guilty of extortion, you must first be convinced beyond a reasonable doubt that the payment alleged in a given count in the indictment was made by or on behalf of the doctors with the expectation that such payment would influence Mr. McCormick's official conduct, and with the knowledge on the part of Mr. McCormick that they were paid to him with that expectation by virtue of the office he held.

It is not illegal, in and of itself, for an elected legislator to solicit or accept legitimate campaign contributions, on behalf of himself or other legislators, from individuals who have a special interest in pending legislation. The solicitation or receipt of such contributions violates the federal extortion law only when the payment is wrongfully induced under color of official right.

Many public officials receive legitimate political contributions from individuals who, the official knows, are motivated by a general gratitude toward him because of his position on certain issues important to them, or even in the hope that the good will generated by such contributions will make the official more receptive to their cause.

The mere solicitation or receipt of such political contributions is not illegal.

It is not necessary that the government prove in this [p. 1187] case that the defendant misused his public office in the sense that he granted some benefit or advantage to the person or persons, here the unlicensed doctors, who allegedly paid him money. Though the unlicensed doctors may have gotten no more than their due in the defendant's performance of his official duties, the defendant's receipt of money, if you find that to have occurred, for the performance of such acts is a misuse of office. When a public official accepts the payment for an implicit promise of fair treatment, if any such promise there were, there is an inherent threat that without the payment, the public official would exercise his discretion in an adverse manner. A claim that a public official's actions would have been the same whether or not he received the

alleged payments is, for this purpose, irrelevant and is no defense to the charges contained in counts one through five of the indictment.

So it is not necessary that the government prove that the defendant committed or promised to commit a quid pro quo, that is, consideration in the nature of official action in return for the payment of the money not lawfully owed. Such a quid pro quo may, of course, be forthcoming in an extortion case or it may not. In either event it is not an essential element of the crime.

While it is not necessary to prove that the defendant specifically intended to interfere with interstate commerce, it is necessary as to this issue that the government prove that [p. 1188] the natural consequences of the acts alleged in the indictment would be to delay, interrupt, or adversely affect interstate commerce, which means the flow of commerce or business activities between two or more states.

Potential future effect on commerce is enough to satisfy this element.

Now, in count six, it is alleged that on or about April 23, 1985, in the Southern District of West Virginia, the defendant willfully made, subscribed, and filed a false 1984 United States Individual Income Tax Return, Form 1040, which was verified by a written declaration that it was made under penalties of perjury, and which reflected taxable income of 52,845 dollars, with a tax due of 12,046 dollars, when the defendant knew and believed the correct taxable income was approximately 57,000 dollars, that is, 57,145 dollars.

There are three essential elements required to prove beyond a reasonable doubt before the defendant may be found guilty of the offense charged in count six.

1. That on or about the date and place alleged in count six, the defendant did willfully make or subscribe a tax return described in that count, which was filed with the Internal Revenue Service, and which was false as to the material matter charged in count six;

2. That the return was verified by written declaration that it was made under the penalties of perjury; [p. 1189] and

3. That the defendant did not believe the tax return to be true and correct as to the material matter alleged in count six.

Again, the burden is always on the government to establish each of these elements by proof beyond a reasonable doubt. The law never imposes upon a defendant in a criminal case the burden of introducing any evidence or calling any witnesses.

The court instructs you that the question of the materiality of the alleged false statements made in connection with the signing of a tax return is a question of law for the court. The court further instructs you that if you find that the defendant willfully failed to report all his taxable income as stated in the indictment in count six, then I further instruct you that such failure to report all of his taxable income is a material matter under the law. In this regard, the United States does not have to show that the

defendant failed to report any particular amount of taxable income, but, rather, that the defendant failed to report some taxable income.

The word "subscribed" simply means the signing of one's name to a document. The fact that an individual's name is signed to a return is prima facie evidence for all purposes that the return was actually signed by him, which is to say that unless and until outweighed by evidence in the case which [p. 1190] leads you to a different and contrary conclusion, you may find that a filed tax return was in fact signed by the person whose name appears to be signed to it.

In proving that the defendant violated the charges contained in count six, or at least attempting to do so, the government does not have to prove that there was a tax due and owing for the year in issue. Whether the government has or has not suffered a pecuniary or monetary loss as a result of the alleged return is not an element of the crime charged in count six.

A contribution voluntarily made with the specific purpose of financing a political candidate's campaign is not necessarily income to the candidate. However, if and when that candidate converts such contribution to his personal use, that is, for any purpose other than meeting campaign expenses, that portion so used then becomes income to a candidate and, as such, is subject to taxation, and must be properly reported.

Therefore, if you from the evidence believe all or any part of the moneys allegedly transferred in this case were campaign contributions, you must further be convinced beyond a reasonable doubt that the defendant converted

such contributions to his personal use before you may find that those contributions were taxable income of his.

Remember, only that portion of any campaign contribution that you are convinced beyond a reasonable doubt [p. 1191] that the defendant converted to his personal use is taxable income to him.

To convert to his own use in this case means to use or hold for any purpose other than meeting a legitimate campaign expenses.

Count six of the indictment charges that the defendant willfully filed a false income tax return for the year 1984 by failing to declare as taxable income the 4300 dollars he allegedly received in that year from John Vandergrift and Dr. Manuel.

Even if you believe that the defendant was given all or part of that money, if the money was purely a gift, without expectation of benefit, or if it constituted voluntary political contributions, whether one or more, it was to that extent not taxable income and Mr. McCormick's failure to report it on his tax return was not illegal.

* * *

COURT'S SUPPLEMENTAL INSTRUCTIONS
TO THE JURY
December 5, 1988

(From Transcript Volume 7)

[p. 1210] THE COURT: Ladies and gentlemen, with respect to the [p. 1211] sixth count, that is, the tax count,

the tax return count, I want to give you one further instruction as follows:

Where a political gift is received by an individual or a political organization and it is held or used for present or future expenses of a political campaign or for some similar purpose, it is not taxable income to the recipient, in the absence, of course, of being converted to the recipient's personal use for other than a political campaign or similar purpose.

In order to constitute nontaxable political contributions, the payments must have been made for one or more of the following purposes:

(1) utilized for generally recognized campaign expenses, regardless of when such expenses were incurred; or

(2) used to reimburse the political candidate for out-of-pocket campaign expenses paid by him during a current campaign, or, if he is not currently campaigning, during his last previous campaign.

In determining whether a particular payment represents a nontaxable political contribution, it does not matter whether or not the payment may have violated some state election law.

* * *

COURT'S SUPPLEMENTAL INSTRUCTIONS TO THE JURY
December 6, 1988
(From Transcript Volume 8)

[p. 1236] THE COURT: Ladies and gentlemen, in response to your inquiry, the court has conferred with counsel at some length about the response that should be made to you, and what the court has determined to do is to read those instructions that have to do with the material in particular relating to counts [p. 1237] one to five on extortion and count six being the tax count or tax return count. So you may be getting a little more than you asked for.

But I want to impress upon you that even though the court is not reading the entirety of the instructions, I'm a bit concerned about not doing that and I want you to understand, as I told you in the course of giving the instructions at the outset, that you are not to consider any one of these instructions alone as stating the law, but, rather, you are to consider the instructions as a whole. So even though I'm going to focus on only about half the material that I gave you before, I want you to keep in mind that it is absolutely essential that when you receive this, you do so in the context of the instructions in their entirety, considering them as a whole.

Your questions were as follows: We would like to hear the instructions again with particular emphasis on the definition of extortion under the color of official right and on the law as regards the portion of moneys received that does not have to be reported as income.

If it develops after giving you these instructions, the court somehow still hasn't focused precisely on what you

have in mind, then I will be happy to hear from you further, but I think if the instructions are reread, that we will embrace the concerns that you have.

[p. 1238] Counts one through five, the extortion counts allege that on or about five specified dates during 1984 and 1985, the defendant affected or attempted to affect interstate commerce by using his public office as a member of the West Virginia House of Delegates to extort illegal cash payments from certain foreign doctors holding temporary permits to practice medicine in the state who had failed to pass the required examination and who were attempting to obtain permanent medical licenses.

Each of the five counts alleges an approximate amount of cash was paid directly and indirectly by the foreign doctors to the defendant and that the payments were not due the defendant or his office. Each alleged payment constitutes a separate offense.

Before the defendant may be found guilty of the charge contained in counts one through five, and government must prove beyond a reasonable doubt each of the following three essential elements as to each such count:

One, that at or near the time and place alleged, the defendant induced a case payment from the foreign doctors, as alleged in such count;

Secondly, that the defendant did so knowingly and willfully by extortion; and

Third, that in doing so, the defendant affected or attempted to affect interstate commerce.

Now then, as I also have told you so many times, the [p. 1239] burden is always on the government to establish

each of those elements by proof beyond a reasonable doubt. The law never imposes on the defendant in a criminal case the burden of producing any evidence or calling any witnesses.

The term "extortion" means the obtaining of property from another, with his consent, either induced by the wrongful use of fear or induced under color of official right.

The term "wrongful" means the obtaining of property unfairly and unjustly by one having no claim thereto.

The United States must prove that the defendant induced the person or persons described in the indictment to part with property, a term which includes money. It is charged that the defendant did so under color of official right.

In proving this element, the government must prove beyond a reasonable doubt that the benefactor transferred something of significant value, here alleged to be money, to the public official with the expectation that the public official would extend to him some benefit or refrain from some harmful action, and the public official accepted the money knowing it was being transferred to him with that expectation by the benefactor and because of his office.

In determining whether the defendant induced the person or persons described in the indictment to part with property at the time of the alleged events in counts one and two, you may take into account all the surrounding [p. 1240] circumstances, including any words spoken by or actions of the defendant, if any, prior thereto or in

connection therewith. In determining whether the defendant induced the person or persons described in the indictment to part with property as alleged in counts three, four, and five, you may take into account all the surrounding circumstances, including any course of conduct on the part of the defendant, if any, which may bear thereon.

And so, inducement can be in the form of a demand, or in a more subtle form such as custom or expectation such as might have been communicated by the nature of the defendant's prior conduct of his office, if any.

In this case, the government has charged that extortion was committed under color of official right, in that the defendant is charged with committing extortion by virtue of his office as a member of the West Virginia House of Delegates.

Extortion under color of official right means the obtaining of money by a public official when the money obtained was not lawfully due and owing to him or to his office. Of course, extortion does not occur where one who is a public official receives a legitimate gift or a voluntary political contribution even though the political contribution may have been made in cash in violation of local law. Voluntary is that which is freely given without expectation of benefit. And that term "voluntary" appears in several places during the course of [p. 1241] these instructions.

Extortion under color of official right does not require proof of specific acts of the public official demonstrating force, threats, or the use of fear so long as the

victim consented because of the office or position held by the office.

Where, as here, the indictment charges that the alleged extortion was committed under color of official right, the government need not prove that the alleged victim of the extortion, here the unlicensed doctors, was, in fact, in a state of fear at the time the payments in question were made, although they may have been.

Extortion under color of official right is committed wherever a public officer makes wrongful use of his office to obtain money not due to him or his office. It is the public official's misuse of his office which, by itself, supplies proof of the necessary element of coercion. Therefore, the wrongful use of the official power need not be accompanied by actual or threatened force, violence, or fear.

If the public official knows the motivation of the victim to make any payment focuses on the public official's office, and money is obtained by the public official which was not lawfully due and owing to him or the office he represented, or which he was not otherwise lawfully entitled to receive, that is sufficient to satisfy the government's burden of [p. 1242] showing a misuse of office and extortion under color of official right. However, again, the mere voluntary payment of money, without expectation of some benefit, does not constitute extortion.

Finally, to prove extortion under color of official right, the government need not establish that the defendant actually possessed authority over the passage of the legislation in question.

Now, while it is not necessary to prove that a defendant specifically intended to interfere with interstate commerce, it is necessary as to this issue that the government prove that the natural consequence of the acts alleged in the indictment would be to delay, interrupt, or adversely affect interstate commerce, which means the flow of commerce or business activities between two or more states.

Potential of future effect on commerce is enough to satisfy that element.

It is not necessary that the government prove in this case that the defendant misused his public office in the sense that he granted some benefit or advantage to the person or persons, here the unlicensed doctors, who allegedly paid him money. Though the unlicensed doctors may have gotten no more than their due in the defendant's performance of his official duties, the defendant's receipt of money, if you find that to have occurred, for the performance of such acts is a misuse of [p. 1243] office. Whether a public official accepts a payment for an implicit promise of fair treatment, if any such promise there were, there is an inherent threat that without the payment, the public official would exercise his discretion in an adverse manner. A claim that a public official's actions would have been the same whether or not he received the alleged payments is, for this purpose, irrelevant and is no defense to the charges contained in counts one through five of this indictment.

So, it is not necessary that the government prove that the defendant committed or promised to commit a quid pro quo, that is, consideration in the nature of official

action in return for the payment of money not lawfully owed. Such a quid pro quo may, of course, be forthcoming in an extortion case or it may not. In either event it is not an essential element of the crime.

It is not illegal, in and of itself, for an elected legislator to solicit or accept campaign contributions on behalf of himself or other legislators from individuals who have a special interest in pending legislation. The solicitation or receipt of such contributions violates the federal extortion law – and that's what we're concerned with, the federal extortion law – only when the payment is wrongfully induced under color of official right.

Many public officials in this country receive [p. 1244] political contributions from individuals who, the official knows, are motivated by a general gratitude toward him because of his position on certain issues important to them, or even in the hope that the goodwill generated by such contributions will make the official more receptive to their cause.

The mere solicitation or receipt of such political contributions is not of itself illegal.

There has been evidence in this case that for some years before 1984, as well as during the 1984 and 1985 legislative sessions, Robert McCormick was a leading supporter of legislation to permit foreign medical school graduates who did not meet all of the regularly licensing requirements to practice in areas of West Virginia which needed physicians.

It would not be illegal, in and of itself, for Mr. McCormick to solicit or accept political contributions

from foreign doctors who would benefit from this legislation.

In order to find Mr. McCormick guilty of extortion, you must be convinced beyond a reasonable doubt that the payment alleged in a given count of the indictment was made by or on behalf of the doctors with the expectation that such payment would influence Mr. McCormick's official conduct, and with knowledge on the part of Mr. McCormick that they were paid to him with that expectation by virtue of the office he held.

Now, turning to count six, it is alleged there that on or about April 23, 1985, in the Southern District of West [p. 1245] Virginia, the defendant willfully made, subscribed, and filed a false 1984 United States Individual Income Tax Return, Form 1040, which was verified by a written declaration that it was made under the penalties of perjury, and which reflected taxable income of 52,854 dollars, with a tax due of 12,046 dollars, when the defendant knew and believed the correct taxable income was 57,145 dollars.

Three essential elements are required to prove beyond a reasonable doubt before the defendant may be found guilty of the offense charged in count six as follows:

One, that on or about the date and place alleged, the defendant did willfully make or subscribe the tax return described in count six, which was filed with the Internal Revenue Service, and which was false as to the material matter charged in count six;

Secondly, that the return was verified by written declaration that it was made under the penalties of perjury; and

Three, that the defendant did not believe the tax return to be true and correct as to the material matter alleged in count six.

Again, the burden is always on the government to establish each of these elements by proof beyond a reasonable doubt. The law never requires the defendant to produce any witnesses or any evidence.

[p. 1246] The word "subscribe" simply means the signing of one's name to a document. The fact that an individual's name is signed to a return should be prima facie evidence for all purposes that the return was actually signed by him, which is to say that unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find that a filed tax return was, in fact, signed by the person whose name appears to be signed to it.

In proving that the defendant violated the charges contained in count six, the government does not have to prove that there was a tax due and owing for the year in issue. Whether the government has or has not suffered a pecuniary or monetary loss as a result of the alleged return is not an element of this crime.

The court instructs you that the question of materiality of the allegedly false statements made in connection with the signing of the tax return is a question of law for the court. The court further instructs you that if you find that the defendant willfully failed to report all of his

taxable income as stated in the indictment, then I instruct you that such failure to report all of his taxable income is a material matter under the law. In this regard, the United States does not have to show that the defendant failed to report any particular amount of taxable income, but, rather, that the defendant failed to report some taxable income as [p. 1247] alleged in the indictment.

Count six charges that the defendant willfully filed a false income tax return for the year 1984 by failing to declare as taxable income the 4300 dollars he allegedly received in that year from John Vandergrift and Dr. Manuel.

Even if you believe that Mr. McCormick was given all or part of this money, if the money was purely a gift without expectation of benefit, or if it constituted voluntary political contributions, it was not taxable income and Mr. McCormick's failure to report it on his tax return was not illegal.

A contribution voluntarily made for the specific purpose of financing a political candidate's campaign is not necessarily income to the candidate. However, if and when that candidate converts such contributions to his personal use, that is, for any purpose other than meeting campaign expenses, that portion so used then becomes income to the candidate and, as such, is subject to taxation and must be properly reported.

Therefore, if you find from the evidence believe – that is, if you from the evidence believe all or any part of the moneys allegedly transferred in this case were campaign contributions, you must further be convinced beyond a reasonable doubt that the defendant converted

such contributions to his personal use before you may find that those contributions were taxable income of his.

[p. 1248] Remember, only that portion of any campaign contribution that you are convinced beyond a reasonable doubt the defendant converted to his personal use is taxable income to him.

To convert to his own use in this case means to use or hold for any purpose other than meeting legitimate campaign expenses.

Where a political gift is received by an individual or a political organization and it is held or used for present or future expenses of a political campaign or for similar purposes, it is not taxable income to the recipient.

In order to constitute nontaxable political contributions, the payments must have been made for one or more of the following purposes:

One, utilized for generally recognized campaign expenses, regardless of when such expenses were incurred, or

Two, used to reimburse the political candidate for out-of-pocket campaign expenses paid by him during a current campaign, or, if he is not currently campaigning, during his last previous campaign.

In determining whether a particular payment represents a nontaxable political contribution, it does not matter whether or not the payment may have violated some state election law, although the fact that the payment is found to have violated some local election law may be

taken into account for such [p. 1249] value as it may have, if any, on the issue of intent.

* * *

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 89-1918

In The

Supreme Court of the United States

October Term, 1990

ROBERT L. McCORMICK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF PETITIONER

*Rudolph L. Di Trapano
Rebecca A. Baitty
Di Trapano & Jackson
604 Virginia Street, East
Charleston, West Virginia
25301
(304) 342-0133

Counsel for Petitioner
*Counsel of Record

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Hobbs Act's prohibition against payments extorted "under color of official right" applies to criminalize an elected legislator's solicitation of campaign contributions from constituents whose legislative issues he is supporting, absent any proof of coercion or a *quid pro quo*.

II. Whether an elected official is guilty of filing a false tax return due to his failure to report a campaign contribution which was not coerced, did not constitute a *quid pro quo*, and was not converted to his personal use.

III. Whether the standards applied by the district court in its jury instructions, and the Court of Appeals in its opinion, for determining when the solicitation or receipt of campaign contributions violates the Hobbs Act, are impermissibly vague or overbroad.

IV. Whether the evidence in this case was sufficient to enable a properly instructed jury to find the petitioner guilty of extortion and filing a false income tax return.

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No. 90-1918

In The

Supreme Court of the United States

October Term, 1990

ROBERT L. McCORMICK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF PETITIONER

On June 5, 1990, Robert L. McCormick, the Defendant below, filed a Petition for Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Fourth Circuit affirming his conviction in this matter. On October 1, 1990, the Court granted a Writ.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 896 F.2d 61 (1990) and

also is set forth in the Appendix to the Petition at 1. The order of the Court of Appeals denying Mr. McCormick's Petition for Rehearing and Suggestion of Rehearing *En Banc* is set forth in the Appendix to the Petition at 33.

Citations herein are to the Appendix to the Petition ("Pet. App."), the Joint Appendix ("J.A.") or the trial transcript ("Tr.").

JURISDICTION

Petitioner's conviction for violations of 18 U.S.C. § 1951 (The Hobbs Act) and 26 U.S.C. § 7206(1) was affirmed by the United States Court of Appeals for the Fourth Circuit on February 12, 1990. The Court of Appeals denied Mr. McCormick's Petition for Rehearing on March 7, 1990. The Petition for a Writ of Certiorari was filed on June 5, 1990.

This Court's jurisdiction to review the Court of Appeals' decision is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 1951 ("The Hobbs Act"), and 26 U.S.C. § 7206(1), are reprinted in the Appendix.

STATEMENT OF THE CASE

1.

Procedural Background

Petitioner Robert L. McCormick, a member of the West Virginia House of Delegates who had long been a

leading advocate of legislation to allow foreign medical school graduates to practice in underserved areas of the state without meeting full licensing requirements, was convicted of extortion "under color of official right" in violation of the Hobbs Act, 18 U.S.C. § 1951, based upon his receipt of a $900 cash campaign contribution from a lobbying organization for such physicians. He also was convicted of filing a false federal income tax return, in violation of 26 U.S.C. § 7206(1), because he failed to report the contribution, and others he allegedly received from the same organization,[1] on his tax return.

Mr. McCormick's primary defense with respect to the extortion charges was that he was entitled to request campaign contributions, even from persons with an interest in pending legislation, so long as he did not either coerce the potential contributors, or solicit a contribution as a *quid pro quo* for his official action. This defense was effectively nullified by the District Court's instructions to

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[1] The indictment charged Mr. McCormick with five counts of extortion, based upon five alleged payments to Mr. McCormick from the doctors, the first two occurring on the same day, June 1, 1984, and the remaining ones occurring between November 1, 1984 and May 15, 1985.

The final count of the indictment charged Mr. McCormick with filing a false tax return, in violation of 26 U.S.C. § 7206(1), by failing to report as income the four payments he allegedly received in 1984.

The jury convicted Petitioner of the first extortion charge, and of the tax charge, but failed to reach a verdict on the other extortion counts.

the jury, which informed them that neither element was required to convict.[2]

With respect to the tax charge, Petitioner argued that, since the government's own theory was that the payments were intended to reimburse Mr. McCormick for expenses he had incurred in his reelection campaign, and there was no evidence that any campaign funds had been converted to personal use, the payments were nontaxable political contributions which need not be reported.

Following his conviction, Mr. McCormick was fined fifty thousand dollars ($50,000.00), plus nine hundred dollars ($900.00) restitution and costs, and was given a three year suspended sentence and probation.

On appeal to the Fourth Circuit Court of Appeals, Mr. McCormick argued that, in order to convict an elected official of extortion for solicitation of campaign

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[2] Following approximately two hours of deliberation, the jury asked that the instructions be read again, "with particular emphasis on the definition of extortion under the color of official right and on the law as regards the portion of moneys received that does not have to be reported as income" (Tr. 1219).

Five hours after a modified version of the pertinent instructions was read (Tr. 1236-51), the jury informed the court that it had reached agreement on one count, but was "at an impasse on the other five" (Tr. 1253). The district court instructed the jury to continue deliberations, and delivered a modified *Allen* charge the following morning (Tr. 1259-61). After deliberating for an additional four hours on the second day, the jury announced that it had reached a verdict on a second count, but appeared deadlocked on the remaining four (Tr. 1262). Following another two hours of deliberation, the deadlock remained (Tr. 1265).

contributions, the government should be required to show either actual coercion or that the contribution represented a *quid pro quo* for official action. Since the evidence failed to show either element – and the jury was specifically instructed that neither coercion nor a *quid pro quo* need be proved – Mr. McCormick asserted, alternatively, that the evidence was insufficient to support his conviction for extortion or for filing a false tax return, and that the flawed jury instructions required a retrial.

The Court of Appeals ruled that, even in the absence of coercion or a *quid pro quo*, an elected official may be convicted of extorting campaign contributions (and also of failing to report such contributions on his tax return) based almost entirely on evidence that the payments were made in cash and unreported, in violation of state election laws, and thus "not treated as legitimate campaign contributions by either the payor or the official," (Pet. App. 16).

The Court of Appeals specifically held that there was sufficient evidence to support the convictions, but failed to rule on Petitioner's jury instruction arguments.[3]

2.

Factual Background

In this case, a veteran state legislator was convicted of extortion and filing a false tax return, based upon his receipt of a nine hundred dollar ($900) cash contribution,

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[3] Although the unexplained omission of the jury instruction issue from the Court of Appeals' opinion was raised as grounds for Mr. McCormick's Petition for Rehearing, the Petition was denied without comment (Pet. App. 33).

four days before an election, from a special interest group whose cause he had prominently supported for years, without any evidence that the payment was coerced or constituted a *quid pro quo*.

Acknowledging "that the facts in this case present a fine distinction," the Fourth Circuit nevertheless upheld the convictions, ruling that by accepting cash contributions and failing to include them on required campaign financing reports,[4] Petitioner had violated the Hobbs Act, regardless of whether the contributions were coerced or represented a *quid pro quo* for some official action.

The historical background of the political contributions at issue in this case was summarized in the Fourth Circuit's opinion:

> McCormick is a member of the West Virginia House of Delegates representing an economically depressed, coal mining region of West Virginia which has long suffered from a shortage of medical personnel. To help alleviate this problem, he has been a leading advocate of legislation to allow foreign medical school graduates to practice in underserved areas of the state without meeting full licensing requirements.
>
> For the past twenty years, foreign medical school graduates who had not met the state medical licensing requirements have been

[4] Acceptance of a cash contribution of more than fifty dollars ($50.00) is a misdemeanor under West Virginia's election law, punishable by a fine equal to three times the amount of the contribution. W. Va. Code § 3-8-5d. The willful filing of a "grossly incomplete or inaccurate" campaign disclosure statement also is a misdemeanor, punishable by a fine of not less than five hundred dollars, or not more than one year in the county jail, or both. W. Va. Code § 3-8-7.

> allowed to practice medicine under a "temporary permit" while studying further for the state licensing exams. Some of these persons had been taking and failing the exams for a number of years. During this time they were developing considerable on-the-job experience, and their services were needed in areas of the state such as McCormick's district.
>
> In the 1980s there was a strong movement in the House of Delegates to end this "temporary permit" option. Fearing that this movement jeopardized their careers, several of the temporarily licensed doctors organized themselves, incorporated their group under the name "Coalfield Health Care Association" ("the Association"), and hired a lobbyist, John Vandergrift, to represent them in the state capital. Dr. Ernesto Manual was the leader of this group. In the 1984 West Virginia legislature, the Association and Vandergrift worked for legislation extending the temporary permitting procedures one more year. McCormick sponsored the House version of this proposed legislation which passed on the last day of the regular session of the legislature. Shortly thereafter, Vandergrift discussed with McCormick additional legislation, to be introduced during the 1985 session, providing a permanent solution to the doctors' problem by granting them a permanent medical license as a result of their years of experience. McCormick agreed to sponsor the 1985 legislation.

Mr. McCormick's support for the legislation enabling the foreign doctors to continue practicing was neither surprising nor tentative. The district he represented was almost entirely dependent upon these physicians for medical care.

In the United States in 1985, there were 21.4 licensed, practicing physicians for every 10,000 persons. In the

state of West Virginia as a whole, even after the influx of foreign trained doctors had doubled the physician population,[5] there were only 14.2 physicians for every 10,000 persons (Tr. 978-87). And in Mr. McCormick's district, the physician-to-population ratio was only one-half that of West Virginia as a whole: 7.4 for every 10,000 persons, *id*.

The only hospital of any significant size in the district, Logan General Hospital, was staffed almost entirely by temporarily licensed, foreign physicians (Tr. 768-69, 336-37). By 1983, three of Logan General's key staff physicians still had been unable to pass the FLEX exam, and were facing loss of their temporary licenses in June of 1984 (Tr. 550-52, 337-38). The hospital administrator, according to a state Board of Medicine member, "called everybody in the state. He says that those three guys are his three best doctors" (Tr. 456). Hospital officials feared that, if these temporary permit holders were not permitted to practice, the hospital's emergency room and many of its clinics would have to be closed immediately (Tr. 345-46, 687, 737-40). The nearest emergency services in the area then would be in Charleston – a two and one-half hour drive away (Tr. 345, 688).

The hospital officials arranged numerous formal and informal meetings with legislators to keep them apprised of the crisis, and repeatedly asked their legislators to do whatever they could to ensure the hospital's continued ability to use the temporarily licensed doctors on its staff. (Tr. 906-07, 769-70). The officials recognized Mr. McCormick as their chief proponent within the legislature, and

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[5] *See* Gov. Ex. 7, Transcript of Proceedings Before the House of Delegates, West Virginia Legislature, Re: House Bill 1431, 3/13/85.

testified that his support for the legislation always was enthusiastic and unequivocal, *id*.

In fact, the first contact between Mr. McCormick and the foreign doctors whose contribution led to his conviction was initiated by the doctors themselves, who recognized Petitioner as their primary advocate in the legislature, with a history of commitment to their cause, before they ever had any direct contact with him (Tr. 152, 228-29).

Some months after he had agreed to sponsor the 1985 legislation, Mr. McCormick was back in his district, facing a difficult and expensive primary election challenge. He was managing his campaign financing personally, without a separate financial agent or committee, as is permitted under West Virginia law. W. Va. Code § 3-8-1 *et seq*. A week before the election, in a telephone conversation with the doctors' lobbyist, John Vandergrift, Mr. McCormick stated:

> that his campaign was rather expensive, the election was coming up, and that he had put out a couple of thousand dollars out of his pocket and he hadn't heard anything from the foreign physicians and he wanted to know what [Vandergrift] was going to do about it (Tr. 167-68).

Vandergrift's description of the telephone conversation was the *entire* evidence concerning Mr. McCormick's solicitation of any campaign contributions from the foreign doctors.

Vandergrift testified that he wanted to help assure Petitioner's reelection because he was "[v]ery instrumental. He was the foremost proponent of the foreign doctors and he was very helpful legislatively" (Tr. 169).

He called Dr. Manual, and "stressed to him I thought it was very important that we get some money to help Bob in his campaign" (Tr. 169).

On the morning of June 1, 1984, a few days after his phone conversation with petitioner and four days before the primary election, Vandergrift received from Manual an envelope with nine one-hundred-dollar bills which he delivered to McCormick at his business office. McCormick's receipt of this money constituted the basis for the sole extortion charge on which he was convicted (Pet. App. 6).

At trial, the doctors testified repeatedly and unequivocally that they never believed that Mr. McCormick's continuing efforts on their behalf were contingent upon his receiving a contribution from them. They stated that Petitioner had never asked for anything in return for his assistance (Pet. App. 38-44).

The government's evidence also showed that a second delivery of two thousand dollars in cash was made that same afternoon, although the jury was unable to reach a verdict on this extortion charge.

There was also evidence that McCormick received four more cash payments directly from Dr. Manual, who testified that they were intended as campaign contributions to other supporters of the doctors' cause, who faced general election battles.[6] The jury also failed to reach a verdict on the extortion charges based on these payments.

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[6] Mr. McCormick's most significant opposition, in his overwhelmi gly Democratic district, was in the primary

(Continued on following page)

McCormick neither reported any of these payments as campaign contributions on the required reporting statements nor listed them on his income tax return (Pet. App. 6).

In March of 1985, the bill sponsored by Mr. McCormick, which allowed experienced physicians to be permanently licensed without attaining the minimum passing score on the licensing exams, was passed by the state House of Delegates, by a vote of 75-24. It also passed the Senate easily, and became law.

At the time of Mr. McCormick's trial, Doctors Manual, Goshien and Cabauatan still were working as hospital staff physicians in Logan County, with licenses

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(Continued from previous page)

election. Dr. Manual testified that, during one of many conversations with McCormick regarding the pending legislation, McCormick "scolded me for spending too much money and that he is doing the best that he can in the right way. And at the end of the particular conversation, I remember that I ask Mr. McCormick is there any other thing that I can do" (Tr. 315).

In response to Dr. Manual's inquiry, Mr. McCormick "mentioned to me that there are other candidates that are having a difficult time in the election and if, you know, helping those candidates will not harm . . . my cause" (Tr. 316). On three subsequent occasions, he stated, he gave Mr. McCormick envelopes containing cash – $800, $600, and $950, respectively – and told Mr. McCormick to give it to supporters of the legislation who needed campaign funding (Tr. 319-32).

He testified, unequivocally, that he did not believe that making these contributions would influence Mr. McCormick in any way (Tr. 363), and added that "most of this checks that I brought to Mr. McCormick is almost on my insistence . . . I am the one is almost pushing this through" (sic) (Tr. 323).

made possible by the passage of HB 1431 (Tr. 550, 883, 286).

SUMMARY OF ARGUMENT

The provision of the Hobbs Act, 18 U.S.C. § 1951, which proscribes extortion "under color of official right" originated with the Anti-Racketeering Act of 1934. Both of these statutes were aimed primarily at labor racketeering, and the official right provision received almost no notice in the legislative history. However, neither the official right language, nor the legislative history of the Hobbs Act or its predecessor, displays the slightest indication that Congress intended the provision to create a broad regulatory framework for state or local government, or to embark on the regulation of local elections, an area of sensitive federal-state relations which traditionally has been left to state regulation.

As it was used at common law and in the New York statute which was the model for the Hobbs Act, extortion under color of official right required coercion, or the use of false pretenses to obtain a fee not lawfully due. The limited legislative history of the Hobbs Act color of official right clause suggests that its scope was intended to be equally narrow. Moreover, the construction given the Hobbs Act by this Court in *United States v. Enmons*, 410 U.S. 396 (1973) compels the conclusion that the Act was not intended to regulate state campaign financing, both because obtaining political contributions is a legitimate goal and thus not within the scope of extortion, and because the principles of lenity and federalism caution

against expanding the reach of the statute beyond that clearly contemplated by Congress.

In addition, Hobbs Act prosecutions based upon political campaign fundraising have serious and inherent problems of vagueness. Modern definitions of extortion were formulated to apply to the behavior of nonelected public officials and employees, whose right (or lack thereof) to receive money from the public is clearly defined by law. These definitions accordingly establish a fairly bright line of demarcation, by holding that any payments not specifically authorized by law constitute extortion, so long as "the motivation for the payment focuses on the public official's office" or the payment is made with an intent to influence official conduct.

However, every campaign contribution received by a public official focuses on his office and, as one court aptly put it, influence "is a term with amoebic contours." *New Jersey State Chamber of Commerce v. Election Law Enforcement Commission*, 82 N.J. 57, 76, 411 A.2d 168, 177 (1980). Under the traditional definitions, it is extraordinarily difficult to distinguish between those contributions which are wholly legitimate, or at least fall within accepted ethical standards, and those which constitute extortion. As an increasing number of Courts of Appeals have acknowledged, application of the Hobbs Act to campaign fundraising, without clear limitations on its scope, fails to provide the fair notice constitutionally required of penal statutes. Moreover, a law imposing such strict limits on campaign fundraising, without confining itself to the truly corrupt transactions involving a *quid pro quo*, would impermissibly restrict protected First Amendment activity.

The Petitioner in this case was convicted of violating the Hobbs Act, and derivatively of filing a false tax return, based on his receipt of contributions which represented neither coercion nor a *quid pro quo*. The jury was repeatedly instructed that it need not find either element in order to convict.

However, both the jury instructions given at Petitioner's trial, and the opinion by the Court of Appeals affirming his conviction, suffer from the same fatal defect: they fail to define extortion in terms that a public official can use to mold his conduct, or that a jury can use to distinguish permissible campaign contributions from the corrupt.

The federal Courts of Appeals which have required coercion or a *quid pro quo* to sustain a Hobbs Act violation based on campaign fundraising at least have provided a standard that is reasonable and understandable. This is the least restrictive standard that this Court should adopt in determining the appropriate reach, if any, of the Hobbs Act into the area of political contributions.

ARGUMENT

I.

CONGRESS DID NOT INTEND THE HOBBS ACT TO APPLY TO THE SOLICITATION OF CAMPAIGN CONTRIBUTIONS BY AN ELECTED STATE OFFICIAL, AT LEAST IN THE ABSENCE OF PROOF OF COERCION OR OF A *QUID PRO QUO*.

The legislative history of the Hobbs Act, 18 U.S.C. § 1951, contains no hint that, in enacting the statute, Congress intended to assume control of the regulation of

state and local election campaign practices, an area in which it traditionally deferred to the states.[7]

The Hobbs Act's proscription against extortion "under color of official right" originated in the Anti-Racketeering Act of 1934, Pub. L. No. 73-376, 48 Stat. 979, which made it unlawful to "obtain[] the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right." *Id.*, § 2(d). The passage of this statute in 1934 produced little debate or legislative history, and none at all on the purpose of the "under color of official right" clause.

The limited legislative history available demonstrates that Congress' intent was to eliminate labor racketeering, and virtually all of the debate on the bill concerned its effect on union activities. *See* H.R. Rep. No. 1833, 73d Cong., 2d Sess. 1-2 (1934) (House report on Anti-Racketeering Act of 1934); S. Rep. No. 532, 73d Cong., 2d Sess. 1-2 (1934) (Senate report on Act). The House Report on

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[7] *See* H.R. Rep. No. 1833, 73d Cong., 2d Sess. 2 (1934) (committee report on Anti-Racketeering Act); S. Rep. No. 532, 73d Cong., 2d Sess. 1-2 (1934) (same); 78 Cong. Rec. 11,402-03 (1934) (Senate agrees to House amendments to Anti-Racketeering Act without debate); 78 Cong. Rec. 5734-35 (1934) (Senate passes Anti-Racketeering Act without debate); 78 Cong. Rec. 11,402-03 (1934) (amended Anti-Racketeering Act passed by House without debate); 89 Cong. Rec. 3228-29 (1943) (debate on H.R. 653, 78th Cong., 1st Sess., virtually identical to Hobbs Act) (remarks of Reps. Hobbs and Sumners concerning "color of official right" provision); H. R. Rep. No. 238, 79th Cong., 1st Sess. 1, 9, *reprinted in* 1946 U.S. Code Cong. Serv. 1360-1370 (committee report on Hobbs Act); S. Rep. No. 1516, 79th Cong., 2d Sess. 1-2 (1946) (same); 92 Cong. Rec. 7308 (1946) (Senate passes Hobbs Act without debate); 91 Cong. Rec. 11,899-922 (1945) (House debate and passage of Hobbs Act).

the bill included a letter written by Attorney General Homer Cummings, stating that the "Sherman Antitrust Act is too restricted in its terms and . . . penalties . . . to make that act an effective weapon in prosecuting [labor] racketeers." H.R. Rep. No. 1833, 73d Cong., 2d Sess. 2 (1934). Thus, the Anti-Racketeering Act of 1934 was "designed to avoid many of the embarrassing limitations in the wording and interpretation of the Sherman Act." S. Rep. No. 532, 73d Cong., 2d Sess. 2 (1934).

The original Senate version of the Anti-Racketeering bill, S. 2248, 73d Cong., 2d Sess., 78 Cong. Rec. 5734-35 (1934), did not contain the color of official right language. It was completely amended in the House, H.R. 6926, 73d Cong., 2d Sess. 78 Cong. Rec. 11,402-03 (1934), because of concern by organized labor that the Senate bill was too restrictive.[8] As Attorney General Cummings stated,

> The original bill was susceptible to the objection that it might include within its prohibition the legitimate and bona fide activities of employers and employees . . . [T]he purpose of the legislation is not to interfere with such legitimate activities but rather *to set up severe penalties for racketeering by violence, extortion or coercion.*

H.R. Rep. No. 1833, 73d Cong., 2d Sess. 2 (1934) (emphasis added). *See also United States v. Local 807 of International Brotherhood of Teamsters*, 315 U.S. 521, 529

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[8] The House Report, submitted along with its new version of S. 2248 (H.R. 6926), was short. In addition to reprinting the text of the new bill, it reprinted the letter written by Attorney General Cummings to Hatton W. Sumners, Chairman of the House Judiciary Committee. H.R. Rep. No. 1833, 73d Cong., 2d Sess. 2 (1934). It did not discuss the color of official right provision.

(1942) (measure redrafted out of "fear that the bill in its then form might result in serious injury to labor").

In 1946, the Anti-Racketeering Act was amended by Pub. L. No. 79-486, § 1(c), 60 Stat. 420, commonly known as the Hobbs Act. The limited purpose of the 1946 amendment was described by this Court in *United States v. Enmons*, 410 U.S. 396 (1973):

> The predecessor of the Hobbs Act, § 2 of the Anti-Racketeering Act of 1934, 48 Stat. 979, proscribed, in connection with interstate commerce, the exaction of valuable consideration by force, violence, or coercion, "not including, however, the payment of wages by a bona-fide employer to a bona-fide employee. . . . " In *United States v. Local 807*, 315 U.S. 521, 86 L. Ed. 1004, 62 S. Ct. 642, the Court held that this exception covered the members of a New York City truck drivers union who, by violence or threats, exacted payments for themselves from out-of-town truckers in return for the unwanted and superfluous service of driving out-of-town trucks to and from the city. The New York City Teamsters would lay in wait for the out-of-town trucks, and then demand payment from the owners and drivers in return for allowing the trucks to proceed into the city. The teamsters sometimes drove the arriving trucks into the city, but in other instances, the out-of-town truckers paid the fees but rejected the teamsters' services and drove the trucks themselves. In several cases there was evidence that, having exacted their fees, the city drivers disappeared without offering to perform any services at all. *Id.*, at 526, 86 L. Ed. 1004. *See also id.*, at 539, 86 L. Ed. 1004 (Stone, C.J., dissenting). The Court held that the activities of the city teamsters were included within the wage exception to the Anti-Racketeering Act although what work they performed was unneeded and

unwanted, and although in some cases their work was rejected.

Congressional disapproval of this decision was swift. Several bills were introduced with the *narrow purpose of correcting the result in the Local 807 case*. HR 32, which became the Hobbs Act, 60 Stat. 420, eliminated the wage exception that had been the basis for the Local 807 decision. But, as frequently emphasized, on the floor of the House, the limited effect of the bill was to shut off the possibility opened up by the Local 807 case, that union members could use their protected status to exact payments from employers for imposed, unwanted, and superfluous services.

U.S. v. Enmons, supra, 410 U.S. at 401-03 (footnotes omitted) (emphasis added).

Although the Hobbs Act made numerous changes in the formulation of the obstruction of commerce violation,[9] the official right clause was brought forward from the 1934 Act without comment or amendment.

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[9] According to the debate on the Hobbs Act, at the time the statute was enacted, the facts of *Teamsters Local 807* were being repeated in cities across the country. 91 Cong. Rec. 11,899, 11,912 (1945) (remarks by Rep. Hobbs). Farmers were stopped at the entrance to major cities by union members and forced to pay a fee if they wished to proceed into the city and conduct business there. *Id.* at 11,911 (remarks by Rep. Jennings). Those who did not pay found their trucks overturned, their drivers beaten, and their merchandise declared "hot" and banned from the market. *Id.* at 11,903 (statement of Rep. Gwynne). As Congress itself noted, the primary purpose of the Hobbs Act was to "protect interstate commerce and free the highways and streets of this country of robbers," *id.* at 11,912

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From its inception in 1934 through its reenactment in the Hobbs Act of 1946, the "color of official right" language was discussed in Congress on only one occasion, during a 1943 debate on HB H.R. 653, 78th Cong., 1st Sess., a bill virtually identical to the present Hobbs Act, but which passed only the House.

The remarks made during the 1943 debate by Congressman Hobbs of Alabama, the bill's sponsor, and Congressman Sumners, the Chairman of the House Judiciary Committee, indicate that Congress intended an extraordinarily limited scope for the color of official right provision:

> Mr. Day: Mr. Chairman, I wonder if the committee is not guilty of some inadvertence in their definition of the word "extortion" on page 2 section (c). I ask the author of the bill to follow me closely. I read:
>
> The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear–
>
> Up to that point it would amount to duress, it is clear intimidation or extortion. Then it states:

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(statement by Rep. Hobbs) because "something should be done in order to protect the truck operators who are trying to deliver food into the various big cities of our nation," *id.* at 11,908 (statement by Rep. Vursell).

or under color of official right.

I want to ask this, and if you do not mean this in the bill, then so state in the interest of clarification of the future enforcement of this act and for the benefit of the House. Inasmuch as the first section of this bill carries a penalty of 20 years and a fine of $10,000, it is not wartime legislation, but is permanent legislation, and an amendment of the act of June 18, 1934.

When you say that by extortion you mean getting money or property from a man with his consent or under color of official right, it would apply to an initiation fee in a labor union.

Mr. Hobbs: Certainly not. *"Color of official right" means absence of right but pretended assertion of right.*

Mr. Day: I know; but what do the words "official right" mean?

Mr. Hobbs: The same thing.

Mr. Day: It has not got to be by some authority?

Mr. Hobbs: In other words, you pretend to be a police officer, you pretend to be a deputy sheriff, but you are not.

Mr. Day: I think the change should be made that I have mentioned.

Mr. Hobbs: *It could not possibly apply if there was any bona fide right; it applies only to pretended right.*

* * *

Mr. Sumners of Texas: May I suggest to my friend that if he will examine the language carefully I believe he will conclude that *it means money acquired by some person who claims to be an officer of the law who is trying to take his money.*

Mr. Day: You say that.

Mr. Sumners of Texas: That is the language.

Mr. Day: It is subject to the construction I have given it or I could not have arrived at it. This is a penal statute. Why do you not make it clear?

Mr. Sumners of Texas: We believe we have. "Officially" means an officer of the Government.

Mr. Day: The gentleman knows there is a quibble in there or he would not be debating it. You are writing a statute here.

Mr. Sumners of Texas: Would the gentleman accept the statement by the chairman of the Judiciary Committee that reported the bill that the language means money acquired by somebody claiming to be a public officer?

Mr. Day: You say that but why do you not say "by some public official"?

Mr. Sumners of Texas: That is it.

Mr. Day: An officer of a union is a private official, not a public official.

Mr. Sumners of Texas: No.

Mr. Day: Why leave any doubt about it? Let us write these laws in clear language.

89 Cong. Rec. 3228-29 (1943) (emphasis added).

The restrictive interpretation advanced by Congressman Hobbs and Sumners has other support in the legislative history of the statute. As the Court observed in *United States v. Enmons, supra,* "[t]he proponents of the Hobbs Act defended the Act . . . on the ground that the statute did no more than incorporate New York's conventional definition of extortion – 'the obtaining of property from another . . . with his consent, induced by a wrongful use of force or fear, or under color of official right.' N.Y. Penal Law § 850 (1909)." *id.*, 410 U.S. at 406 n.16 (citations omitted)[10]. Under the New York statute in effect at the time of the Hobbs Act, N.Y. Penal Law, §§ 850-55 (Consol. 1909), *amended by* 1917 N.Y. Laws ch. 518 (codified at N.Y. Penal Law §§ 850-55 (McKinney 1944)), the scope of extortion under color of official right was narrow.

[10] Congressman Hobbs of Alabama, sponsor of the bill, stated that "there is nothing clearer than the definitions of robbery and extortion in this bill. They have been construed by the courts not once, but a thousand times. The definitions in this bill are copied from the New York Code substantially." 91 Cong. Rec. 11,900 (1945). Congressman Hancock of New York stated: "The bill contains definitions of robbery and extortion which follow the definitions contained in the laws of the State of New York." *Id.*

The New York definition of extortion originated with the Field Code of 1865, Commissioners of the Code, [Proposed] Penal Code of the State of New York (1865), which defined the term, in words almost identical to the Hobbs Act, as "the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." *Id.* § 613. The official comment to this section contains the rather cryptic advice, "See . . . as to extortion under color of official right, *People v. Whaley.*" *Id.* (comment).

The defendant in *People v. Whaley,* 6 Cow. 661 (N.Y. Sup. Ct. 1827), was a justice of the peace who entered judgment against a defendant in his court, although the case first had been discontinued due to the plaintiff's failure to appear, and then had been adjourned, without the defendant's knowledge, to a later date on which neither party appeared. The court upheld Whaley's conviction on the grounds that he had taken money with the knowledge that it was not legally due, and offered the following definition of extortion: "Extortion signifies, in an enlarged sense, any oppression under color of right. In a stricter sense, it signifies the taking of money by any officer, by color of his office; either, where none at all is due, or not so much due, or when it is not yet due." *Id.* at 663-64 (*quoted and discussed in* Lingren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act,* 35 UCLA L. Rev. 815, 893-96 (1988) (hereinafter cited as "Lingren, *The Elusive Distinction*"))[11].

[11] Lingren suggests three possible sources for the "color of official right" language found in the Field Code: (1) Wharton's *A Treatise on the Criminal Law* § 2508 (4th ed. 1857), which

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As Lingren concedes, both the *Whaley* case and the "cold text" of the statute support the narrow view of extortion stated by Hobbs and Sumners in the 1943 debate, as limited to "cases where the official pretends that he has an official right" to the payment, Lingren, *The Elusive Distinction, supra,* at 837, 895-96, although Lingren argues that it should also apply to payoffs obtained through coercion. *See also, United States v. Cerilli,* 603 F.2d 415, 433 (3d Cir. 1979) (Aldisert, J., dissenting) (under the New York law, public official could not be convicted of extortion in the absence of duress unless the official specifically misrepresented the payment as an authorized fee); *United States v. Kubacki,* 237 F.Supp. 638 (E.D. Pa. 1965) (under New York law, extortion and bribery are mutually exclusive, and extortion requires duress). Even Herbert Stern, the father of the modern prosecutorial theory of extortion under color of official right, concedes that "the law of New York, as construed by its courts, is rather unique," Stern, *Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion,* 3 Seton Hall L. Rev. 1, 12 (1971) (hereinafter cited as "Stern, *Prosecutions of Local Political Corruption*").

In *U.S. v. Enmons, supra,* the Court relied on the language and construction of the New York Penal Code,

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prominently discusses the *Whaley* case; (2) the *Whaley* case itself; and (3) Hawkins's *Treatise of the Please of the Crown* 316 (6th ed. 1788), which is quoted in both *Whaley* and Wharton. Lingren, *supra,* at 893-96. All of these sources define official extortion as "the taking of money by any officer, by colour of his office, either where none at all is due, or not so much is due, or when it is not yet due."

to determine that the Hobbs Act was never intended to reach a labor union's activities seeking a legitimate goal, even through violent means:

> Judicial construction of the New York Statute reinforces the conclusion that, however militant, union activities to obtain higher wages do not constitute extortion. For *extortion requires an intent " 'to obtain that which in justice and equity the party is not entitled to receive.' "* An accused would not be guilty of extortion for attempting to achieve legitimate labor goals; he could not be convicted without sufficient evidence that he "was actuated by the purpose of obtaining a financial benefit for himself . . . and was not attempting in good faith to advance the cause of unionism. . . . "

Id. at 406 n.16 (citations omitted) (emphasis added).

Similarly, the language and construction of the New York statute compel the conclusion that an elected official's receipt of campaign contributions – money which he is entitled to receive under law – does not constitute extortion unless obtained through coercion.

A number of federal Courts of Appeals construing the Hobbs Act have chosen to ignore its New York progenitor, and instead have interpreted the "color of official right" provision in accordance with its supposedly broader common law meaning. However, it is clear that even the common law meaning of the term would not encompass the solicitation of campaign contributions, especially without coercion or a *quid pro quo.*

Blackstone defined the crime of extortion as "an abuse of public justice, which consists in an officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due him, or more

than is due, or before it is due." 4 W. Blackstone, *Commentaries* 141 (1769). In its earliest manifestations, the common law offense of extortion prohibited the taking of unwarranted payments by coercion or false pretenses. It also included some forms of bribery, at least where an official had taken money in exchange for a promise to perform some act he was unable legally to perform. Lingren, *The Elusive Distinction, supra;* Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy,* 65 Geo. L.J. 1171 (1977) (hereinafter cited as "Ruff, *Federal Prosecution of Local Corruption*").

The "common law extortion offense arose during times when public officials made their living largely by collecting fees from citizens. Often those collections were regular and legal events. In this context, extortion under color of official right was an offense intended to prevent officials from taking fees to which they had no legal entitlement." Comment, *Prosecuting Public Officials Under the Hobbs Act: Inducement as an Element of Extortion Under Color of Official Right,* 52 U. Chi. L. Rev. 1065, 1084 (1985).

By the time the Anti-Racketeering and Hobbs Acts were passed, the common law crime of extortion was construed quite narrowly. Lingren, *The Elusive Distinction, supra,* at 886, Ruff, *Federal Prosecution of Local Corruption, supra.* Like the New York Statute, the common law crime of extortion was considered to require coercion or the taking of an illegal fee under false pretenses:

> The historical basis of extortion, a common law misdemeanor, was the corrupt collection of an unlawful *fee* under color of public office. The requirement that the unlawful fee be associated with the office held by the recipient is central to an understanding of the traditional Blackstonian

definition generally expressed in broader language. Professor Perkins advises:

> A fee collected under color of office is unlawful if – (1) the law does not authorize a fee for the purpose for which this fee is collected, or (2) a fee is authorized but only in an amount smaller than that collected, or (3) a fee might be authorized but none was due at the time this fee was collected. For this reason Blackstone defined extortion as "an abuse of public justice, which consists in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value that is not due to him, or more than is due, or before it is due." Since a fee is unlawful under any one of the three circumstances the simpler wording is preferred for purposes of definition.
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> [Perkins on Criminal Law 367 (2d ed. 1969)].
>
> Similarly, it is said that "[t]he common-law misdemeanor of extortion consists of the corrupt taking of a fee by a public officer, under color of his office, where no fee is due, or not so large a fee is due,or the fee is not yet due." W. LaFave and A. Scott, Handbook on Criminal Law 704 (1972). It is also emphasized that *at common law the money or property be obtained "under the pretense that the officer was entitled thereto by virtue of his office."* R. Anderson, Wharton's Criminal Law and Procedure 790-91 (1957).

United States v. Cerilli, supra, 603 F.2d 415, 434 (Aldisert, J., dissenting) (footnotes omitted) (emphasis added).

There is no indication that, in enacting the Hobbs Act or its predecessor, Congress intended to expand the restrictive meaning given to the crime of extortion at the time. Indeed, as this Court remarked in *United States v.*

Culbert, 435 U.S. 371, 379 (1978), "[t]he legislative debates are replete with statements that the conduct punishable under the Hobbs Act was already punishable under state robbery and extortion statutes." *See also*, 91 Cong. Rec. 11,906 (1945) (remarks by Rep. Robsion) ("The definitions of robbery and extortion set out in this bill are the same definitions set out in the New York State code of laws and are defined in substantially the same way by the laws of every State in the Union. Of course, it does not apply to any case where personal property of another person is taken lawfully, without force or violence or fear of injury"); *id.* at 11,912 (remarks by Rep. Jennings) ("Those words have been construed a thousand times by the courts. Everybody knows what they mean"); *id.* at 11,914 (remarks by Rep. Russell) ("Wherever jurisprudence has had its sway robbery and extortion have been defined. There is no use defining those terms because they are so well defined that their definition now is a matter of common knowledge").

> Nowhere in the legislative history of either statute is there any indication of congressional intent to reach corrupt demands for payment by local officials, or even a discussion of the problem . . .
>
> [I]f Congress had intended to reach local corruption by creating a felony requiring no proof either of intent to be influenced in one's official capacity or of intent to obtain property by force or threats, surely the proponents of the bills would have mentioned it. Silence on this point becomes even more relevant because the penalty for this new offense was more severe than that for the receipt of a bribe by a federal official and because identical offenses were then punishable as misdemeanors under both federal and state law.

Ruff, *Federal Prosecution of Local Corruption*, *supra*, at 1175, 1198.

Certainly there is no suggestion in the text or legislative history of the Hobbs Act that Congress was embarking on the regulation of an area unknown at common law, and traditionally left to regulation by the states: the conduct of election campaign financing.

In *United States v. Enmons*, *supra*, the Court rejected a broad interpretation of the Hobbs Act urged by the government, which would have expanded its coverage to violence incidental to a union strike. The Court's analysis in that case is equally applicable here:

> Even if the language and history of the Act were less clear than we have found them to be, the Act could not properly be expanded as the Government suggests – for two related reasons. First, this being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity. Secondly, it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States.

Id., 410 U.S. at 411 (citations and footnotes omitted).

In *United States v. Bass*, 404 U.S. 336 (1971), the Court also stressed the necessity for a clear statement of congressional intent before a criminal statute will be held to

have expanded federal jurisdiction into an area traditionally reserved to the states:

> [U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. This congressional policy is rooted in the same concepts of American federalism that have provided the basis for judge-made doctrines. As this Court emphasized only last Term in *Rewis v. United States, supra* [401 U.S. 808 (1971)], we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relations between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, *the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision*. In *Rewis*, we declined to accept an expansive interpretation of the Travel Act. To do so, we said then, "would alter sensitive federal-state relationships [and] could overextend limited federal police resources." While we noted there that "[i]t is not for us to weigh the merits of these factors," we went on to conclude that *"the fact that they are not even discussed in the legislative history . . . strongly suggests that Congress did not intend that [the statute have the broad reach]."* 401 U.S., at 812, 28 L. Ed. 2d at 497. In the instant case, the broad construction urged by the Government renders traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources. Absent proof of some interstate commerce nexus in each case, § 1202(a) dramatically intrudes upon traditional

> state criminal jurisdiction. *As in Rewis, the legislative history provides scanty basis for concluding that Congress faced these serious questions and meant to affect the federal-state balance in the way now claimed by the Government.*

Id. at 349-50 (citations omitted) (emphasis added).

In *Enmons, supra*, the court also emphasized another factor equally applicable to this case:

> [N]ot until the indictments were returned in 1970 in this and several other cases has the Government even sought to prosecute under the Hobbs Act actual or threatened violence employed to secure a union contract "calling for higher wages and other monetary benefit." Yet, throughout this period, the Nation has witnessed countless economic strikes, often unfortunately punctuated by violence. It is unlikely that if Congress had indeed wrought such a major expansion of federal criminal jurisdiction in enacting the Hobbs Act, its action would have so long passed unobserved.

Id. at 409-10 (citation and footnotes omitted).

At the time that the Anti-Racketeering and Hobbs Acts were passed, Congress was clearly concerned with the potential for corruption in the financing of electoral campaigns. The "high water mark" of Congressional regulation of campaign spending had occurred in 1926, when two Senators-elect, William S. Vare and Frank L. Smith, were denied their seats by the Senate because of excessive spending. Assoc. of the Bar of the City of New York, Special Committee on Congressional Ethics, *Congress and the Public Trust*, Atheneum (1970).[12] The

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[12] Vare had spent $786,000 in a Pennsylvania race, and Smith, $458,000 in Illinois. *Id.* at 120. The New York Bar

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Federal Corrupt Practices Act of 1925 and its predecessors had prohibited corporate contributions in federal elections, *see Burroughs v. United States*, 290 U.S. 618 (1933); and a 1947 amendment extended the prohibition to labor unions, *United States v. International Union of United Auto Workers*, 352 U.S. 567 (1957). However, in 1909, the Congress had rejected an attempt to extend the prohibition on corporate contributions to state elections, *id.* at 575, and in the years since then congressional election regulation was limited to elections for federal office, or the conduct of federally chartered corporations.

Given its expressed concern with the issue of campaign funding, and its previous unwillingness to regulate the conduct of state elections, "[i]t is unlikely that if Congress had indeed wrought such a major expansion of federal criminal jurisdiction in enacting the Hobbs Act, its action would have so long passed unobserved." *United States v. Enmons*, *supra* at 410.

Yet, even after it was reenacted in the Hobbs Act in 1946, the official right clause "rested there virtually unnoticed" for twenty-five years. Ruff, *Federal Prosecution of Local Corruption*, *supra*, at 1183.

Until *United States v. Kenny*, 462 F.2d 1205 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972), the Hobbs Act had never been utilized to prosecute any public official for the receipt of unwarranted payments unless the payments

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Committee also reported the low water mark of campaign spending: "In 1846 friends of Abraham Lincoln gave him $200 to run for Congress. He returned $199.25. His only campaign expense was 75 cents for a barrel of cider." *Id.* at 119.

had been obtained by coercion.[13] In fact, the Justice Department policy prior to 1972 was that "the official right language of the Hobbs Act did not provide an independent basis for prosecution." Ruff, *Federal Prosecution of Local Corruption*, *supra*, at 1206 (citing U.S. Department of Justice, *Labor Racketeering Manual* 18-19 (1971) (Hobbs Act indictments of public officials must include element of coercion)).

Since *Kenny*, the Courts of Appeals have progressively expanded the reach of the Hobbs Act in local political corruption cases, although not without vigorous

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[13] The *Kenny* court held that the Hobbs Act defined extortion in the disjunctive, and that a public official could commit extortion "under color of official right" without the use of "force, fear, or violence." In doing so, the court adopted the argument of Herbert J. Stern, the prosecutor in *Kenny*, who wrote a widely cited law review article while the case was pending on appeal: Stern, *Prosecutions of Local Political Corruption*, *supra*. The Stern article acknowledged that courts had consistently required proof of coercion for a Hobbs Act official right prosecution, but argued that the statute's desirability to federal prosecutors – due to its broad jurisdictional base and its severe penalties – made it worthwhile for the government to attempt to expand the traditional reach of the statute. *Id. See also*, U.S. Department of Justice, *Prosecution of Public Corruption Cases* 415 (1988) (Hobbs Act has become most popular tool for federal prosecution of local corruption due to its "ease of proof and severity of penalty").

The Seventh Circuit was the first to affirm a conviction exclusively on the "under color of official right" theory. *See United States v. Staszcuk*, 502 F.2d 875, 877-78 (7th Cir. 1974) (Chicago alderman charged with accepting payments in exchange for promise not to oppose certain zoning changes), *mod. in part on other grounds*, 517 F.2d 53 (7th Cir.) (en banc), *cert. denied*, 423 U.S. 837 (1975).

dissent, *e.g., United States v. Cerilli, supra,* (dissent of Judge Aldisert); *United States v. Mazzei,* 521 F.2d 639 (3d Cir. 1975) (dissent of Judge Gibbons), and occasional relapses to a stricter construction of the law., *e.g., United States v. O'Grady,* 742 F.2d 682 (2d Cir. 1984) (en banc), and *United States v. Aguon,* 851 F.2d 1158 (9th Cir. 1988) (en banc) (mere passive receipt of gratuities, without inducement by public official, is insufficient to establish extortion).

However, until now, almost all courts have observed one limit to the statute's application: an elected official's solicitation of campaign contributions is punishable under the Hobbs Act only if the contributions are coerced or constitute a specific *quid pro quo. United States v. Biaggi,* 909 F.2d 662 (2d Cir. 1990); *United States v. Evans,* 910 F.2d 790 (11th Cir. 1990); *United States v. Egan,* 860 F.2d 904 (9th Cir. 1988); *United States v. Bibby,* 752 F.2d 1116 (6th Cir. 1985); *United States v. Haimowitz,* 725 F.2d 1561 (11th Cir. 1984); *United States v. Dozier,* 672 F.2d 531 (5th Cir. 1982); *United States v. Cerilli,* 603 F.2d 415 (3d Cir. 1979), *cert. denied,* 444 U.S. 1043 (1980). And the Justice Department's written policy, even now, provides that "a campaign contribution will only be considered induced under color of official right where it corresponds to a specific, identifiable *quid pro quo.*" 9 Department of Justice Manual 9-2401 (1988 Supp.); U.S. Department of Justice, *Prosecution of Public Corruption Cases* 420 (1988) (recognizing a "trend of judicial hostility toward the continued expansive use of the Hobbs Act").

In his dissent in *United States v. Cerilli, supra,* Judge Aldisert warned that "[t]he grave danger of our *Kenny* rule is its potential of embracing myriad situations which threaten fundamental federal-state relations and of creating very real tensions in the traditional operations of

political party fund raising." That threat has become reality in the Court of Appeals' ruling in this case.

Neither the language of the statute, nor its history, nor the interpretations given it for more than four decades, give the slightest indication that it was meant to cover the conduct at issue in this case. Under the New York and common law rules, and under any reasonable construction of the Hobbs Act, an elected official's receipt of campaign contributions – money which he is entitled to receive under law – does not constitute extortion unless obtained through coercion.

II.

APPLICATION OF THE HOBBS ACT TO NON-COERCED CAMPAIGN CONTRIBUTIONS, ABSENT PROOF OF A *QUID PRO QUO,* IS IMPERMISSIBLY VAGUE, AND AN OVERLY BROAD RESTRICTION ON ACTIVITY PROTECTED UNDER THE FIRST AMENDMENT.

This Court repeatedly has acknowledged that campaign fundraising is a protected activity at the core of the First Amendment, *e.g., Buckley v. Valeo,* 424 U.S. 1 (1976); *Federal Election Commission v. National Conservative Political Action Committee,* 470 U.S. 480 (1985). "One of the points on which all Members of the Court agree is that money is essential for effective communication in a political campaign," *Buckley v. Valeo, supra,* at 288 (Marshall, J., concurring in part and dissenting in part). The appropriate standard of review for penal statutes which infringe on political fundraising activity is "rigorous." *Buckley v. Valeo, supra,* at 29.

> Close examination of the specificity of statutory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interest . . . In such circumstances, vague laws may not only "trap the innocent by not providing fair warning" or foster "arbitrary and discriminatory application" but also operate to inhibit protected expression by inducing "citizens to ' "steer far wider of the unlawful zone" than if the boundaries of the forbidden areas were clearly marked.' "

Id. at 40-41 and n.48 (citation omitted).

More than one federal judge has concluded that "[a]s is apparent from disparate judicial interpretations, the phrase 'under color of official right', standing alone, is vague almost to the point of unconstitutionality." *United States v. O'Grady*, 742 F.2d 682, 695 (2d Cir. 1984) (en banc) (Van Graafeiland, J., concurring and dissenting). As construed by the Fourth Circuit Court of Appeals in this case, the Hobbs Act falls far short of meeting the required specificity. It is both too vague to give fair notice of its application, and too broad to avoid restricting constitutionally protected First Amendment activity.

All federal Courts of Appeals – and even the United States Department of Justice – have given at least token recognition to the necessity of treating campaign financing as a special category under the Hobbs Act, to avoid penalizing or chilling protected constitutional rights, and to avoid the vagueness problems otherwise inherent in such prosecutions.

Until the Fourth Circuit's opinion in this case, virtually every federal Court of Appeals opinion affirming a

Hobbs Act conviction involving the solicitation of political funds has found either "a specific, identifiable *quid pro quo*" or actual coercion by the public official, or both. *United States v. Egan*, 860 F.2d 904 (9th Cir. 1988); *United States v. Wright*, 588 F.2d 31 (2d Cir. 1978), *cert. denied*, 440 U.S. 917 (1979); *United States v. Mazzei*, 521 F.2d 639 (3d Cir.), *cert. denied*, 423 U.S. 1014 (1975); *United States v. Jarabek*, 726 F.2d 889 (1st Cir. 1984); *United States v. Cerilli*, 603 F.2d 415 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980). *See also United States v. Trotta*, 525 F.2d 1096, 1100 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976) (reversing dismissal of indictment alleging "demand" for contributions without specified *quid pro quo*).

Moreover, at least two Circuits – the Sixth and Eleventh – have squarely held that such exchanges *are required* for a Hobbs Act conviction.

In *United States v. Bibby*, 752 F.2d 1116 (6th Cir. 1985), the Court emphasized that the often-repeated statement, derived from cases involving non-elected officials, that a public official's acceptance of money violates the Hobbs Act " 'so long as the motivation for the payment focuses on the recipient's office' . . . cannot be applied literally. *Otherwise any political contribution could conceivably provide the basis for a Hobbs Act charge*" (emphasis added). *Id.* at 1127 and n.1. However, the jury in Petitioner's case was instructed that such "motivation . . . is sufficient to satisfy the government's burden of showing a misuse of office and extortion under color of official right," J.A. 19, and the Fourth Circuit's opinion in this case also invokes the phrase with approval (Pet. App. 10).

In attempting to fashion a workable definition of extortion in the context of campaign fundraising, the Sixth Circuit expressly held that a *quid pro quo* is an

essential element of a Hobbs Act prosecution based upon an elected official's solicitation of campaign contributions:

> What the Hobbs Act proscribes is the taking of money by a public official *in exchange for specific promises to do or refrain from doing specific things. In other words, there must be a quid pro quo.*

United States v. Bibby, supra, at 1127 n.1 (emphasis added) (citations omitted).

The Eleventh Circuit also has required proof of a *quid pro quo* to sustain an elected official's extortion conviction based on fundraising activities. In *United States v. Haimowitz,* 725 F.2d 1561 (11th Cir. 1984), the Court affirmed several extortion convictions of Haimowitz, a lawyer, and Florida state senator Scarborough, based upon a $7500 "legal fee" paid to Scarborough in return for the senator's promise to intercede with liquor authorities on a restaurant owner's behalf, but held a different view of the defendants' Hobbs Act convictions based upon Scarborough's solicitation of a campaign contribution. It reversed these convictions solely because of the lack of a *quid pro quo*: "there was no proof that *this demand was coupled with a promise* by Scarborough to perform some act of official grace." *Id.* at 1473, 1477 (emphasis added).

This same requirement of a demand coupled with a promise or threat of some official action – essentially a *quid pro quo* – was held by the Fifth Circuit to be the critical factor which saved the Hobbs Act from being unconstitutionally vague in *United States v. Dozier, supra* (acknowledging the "reasonableness of . . . apprehensions" that without such a standard "overzealous but unwitting fundraisers [might] be swept up in a net originally intended for the truly venal," *id.* at 538).

Most recently, in *United States v. Biaggi, supra,* the Second Circuit warned of the dangers inherent in any application of the Hobbs Act to political contributions, and suggested a prerequisite of "egregious circumstances" constituting a *quid pro quo* before the statute is applied in this area:

> There is a line between money contributed lawfully because of a candidate's positions on issues and money contributed unlawfully as part of an arrangement to secure or reward official action, though its location is not always clear. *See United States v. Brewster,* 506 F.2d 62, 78-83 (D.C. Cir. 1974); *see generally* J.T. Noonan, Jr., *Bribes* 621-51 (1984). *The laws governing extortion and bribery may sometimes be too blunt to be used as instruments to police that line,* though cases may be imagined where egregious facts, submitted to a jury under careful instructions, would permit a conviction for bribery based on campaign contributions.

Id., at 695-96 (emphasis added).

The concern reflected in these cases centers on the vagueness inherent in a rule which criminalizes campaign fundraising whenever the donor's motivation focuses on the candidate's office or the donor anticipates some type of benefit as a result of the contribution: virtually any contribution can constitute a violation under such a standard.[14]

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[14] The Circuit Court's opinion in *Buckley v. Valeo* highlights the difficulty of drawing lines in this area, quoting Senator Humphreys ("Those of us who run for office can profess that the campaign contributions we received do not in any way control our votes, but I venture to say that not many believe

(Continued on following page)

> [C]ampaigns are run on platforms that include statements of intention and undertaking to promote certain policies . . . Congressional campaigns are most often financed with contributions from those interested in supporting particular Congressmen and their policies. A legislator must maintain a working relationship with his constituents not only to garner votes to maintain his office but to generate financial support for his campaigns. He must also keep in mind the potential effect of his conduct upon those from whom he has received financial support in the past and those whose help he expects or hopes to have in the next campaign. An expectation or hope of future assistance can arise because constituents have indicated that support will be forthcoming if the Member of Congress champions their point of view. Financial support may also arrive later from those who approve of a Congressman's conduct and have an expectation it will continue. Thus, mutuality of support between legislator and constituent is inevitable. Constituent contributions to a Congressman and his support of constituent interests will repeatedly coincide in time or closely follow one another. It will be the rare Congressman who never accepts campaign contributions from persons or interests whose view he has supported or will support, by speech making, voting, or bargaining with fellow legislators.

(Continued from previous page)

it") and Senator Russell Long ("[W]hen you are talking in terms of large campaign contributions . . . the distinction between a campaign contribution and a bribe is almost a hair's line difference"). *Buckley v. Valeo*, 171 U.S. App. D.C. 172, 519 F.2d 821, 838 (D.C. Cir. 1975) (en banc), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976).

> All of this, or most of it, may be wholly within the law and consistent with contemporary standards of political ethics.

United States v. Brewster, 408 U.S. 501, at 556-58 (1972) (White, J., dissenting).

As Justice White's opinion suggests, members of the legislative branch of government are at particular risk under a vague Hobbs Act standard:

> Campaign contributions from private individuals to Members of Congress have a facial legitimacy and necessity in our system of government and elections which other monetary transfers to public officials do not have. Similarly, interventions by Members of Congress into administrative and regulatory issues and policies on behalf of constituents are seen as a legitimate and important function of one's representative in government. The convergence of these two otherwise legitimate events, campaign contributions and interventions on behalf of a contributor, therefore, should not in itself necessarily indicate unethical conduct.

Rosenberg and Maskell, *Congressional Intervention in the Administrative Process: Legal and Ethical Considerations*, Congressional Research Service 77 (1990) (also warning of danger of inhibiting legislator "from taking official actions, or acting as an official representative of and intervening before the . . . government on behalf of his or her constituents, merely because those constituents have been very supportive of [his] campaign and candidacy," *id.* at 770); *accord, e.g.*, Noonan, *Bribes, supra*, at 621, 696-97 ("[g]iven the acceptance of this mutuality of purpose between contributor and legislator, the prevailing

assumption in America has been that campaign contributions normally fall in the range of cases where specific votes are not being bought").[15]

Even the official policy of the Department of Justice rejects the rule adopted by the Fourth Circuit, and instead provides that "a campaign contribution will only be considered induced under color of official right where it corresponds to a specific, identifiable *quid pro quo*." 9 Department of Justice Manual 9-2401 (1988 Supp.). The Department policy purports to forbid extortion prosecutions for campaign contributions "unless they can be proven to have been given in return for the performance of or abstaining from an official act," and explicitly recognizes that *"otherwise any campaign contributions might constitute a violation." Prosecution of Public Corruption Cases, supra,* at 420 (emphasis added).

Instead of adopting the relatively clear standard reflected in the *quid pro quo* requirement, the Fourth Circuit's opinion sets forth several "circumstances" which a jury should consider in determining whether a political contribution violates the Hobbs Act. However, the opinion never decides the ultimate issue: what precisely must

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[15] *See also*, Sorauf, *Caught in a Political Thicket: The Supreme Court and Campaign Finance*, 3 Const. Comment. 97 (1986):

> It is not especially difficult to show that, in some key and visible votes, members of the Congress support the position of people who give them money. Who would expect it to be otherwise? The analytical problem is one of determining cause and effect; that is, do the votes follow the money, or does the money follow the votes? . . . [E]ven when the vote follows the money there is not necessarily a case of bribery. There must be additional evidence of an explicit prior arrangement. *Id.* at 110-11 and n. 52.

this circumstantial evidence establish? The Court of Appeals clearly states that the evidence need not prove coercion or a *quid pro quo*, but never explains what it *must* prove.

Apparently aware that its opinion fails to articulate a standard by which extortionate campaign fundraising can be distinguished from non-extortionate activity, the Court of Appeals simply cautions prosecutors to "avoid arbitrary and selective prosecution of elected representatives" (Pet. App. 18). However, to paraphrase the Second Circuit's concern over a similar issue under the Hobbs Act (whether passive receipt of payments by non-elected public officials is sufficient to establish a violation), "[t]he fact that ambiguous conduct could be prosecuted under the [Court's holding] raises serious constitutional questions of fair notice and overbreadth and makes a mockery of the principle that criminal statutes must be construed strictly with any ambiguity resolved in favor of lenity. The fact that United States Attorneys are responsible and fair-minded persons offers little comfort here. The evil of selective prosecution is not avoided by the likelihood that de minimis violations will be overlooked. We remain a nation of laws rather than of men." *United States v. O'Grady*, 742 F.2d 682, 694 (2nd Cir. 1984) (en banc) (citations omitted).

The Fourth Circuit's opinion recognizes that, in any Hobbs Act prosecution, "[t]he line is a fine one between an altogether 'voluntary' payment and the conferring of a benefit on someone who holds a particular public office in fear of retaliation or in expectation of benefit." (Pet. App. 10) (quoting *United States v. Barber*, 668 F.2d 778, 783 (4th Cir.), *cert. denied*, 459 U.S. 829 (1982)). The opinion

also seems to recognize the special difficulty "in articulating a standard to distinguish [voluntary] campaign contributions to elected representatives from monies extorted because of the official's position." (Pet. App. 13). Finally, the Fourth Circuit "acknowledge[s] that the facts in this case present a fine distinction." *Id.* at 11.

In the face of all these fine lines and difficult distinctions, the Court of Appeals' opinion offers an astonishingly uncertain standard to distinguish extorted campaign contributions from those which, while they may have been made in violation of state elections laws, do not violate the federal Hobbs Act.

The Fourth Circuit's analysis of this critical issue is relatively brief:

> [W]e now hold that the circumstances surrounding money given to elected officials may be sufficient, without proof of an explicit *quid pro quo* exchange, to prove that the payments were never intended to be legitimate campaign contributions. Receiving such payments violates the Hobbs Act. Some of the circumstances that should be considered in making this determination include, but are not limited to, (1) whether the money was recorded by the payor as a campaign contribution, (2) whether the money was recorded and reported by the official as a campaign contribution, (3) whether the payment was in cash, (4) whether it was delivered to the official personally or to his campaign, (5) whether the official acted in his official capacity at or near the time of the payment for the benefit of the payor or supported legislation that would benefit the payor, (6) whether the official had supported similar legislation before the time of the payment, and (7) whether the official had directly or indirectly solicited the payor individually for the payment.

(Pet. App. 17-18).

The Court of Appeals' opinion raises more questions than it answers in this troubling area. Most importantly, the opinion never decides the ultimate issue: what must this circumstantial evidence regarding the *manner* of the contribution establish in order to prove that its *nature* is extortionate? The Court clearly states that the evidence need not prove coercion or a *quid pro quo*, but never explains what it *must* prove. It assuredly lacks the "clarity [which] is necessary whenever a criminal statute's 'margin' may fade into areas protected by the First Amendment," such as political fundraising. *United States v. Dozier, supra*, 672 F.2d at 539.

Contrary to the Fourth Circuit's suggestion, a requirement that a Hobbs Act conviction due to campaign fundraising activities be based upon proof of either actual coercion or a specific *quid pro quo* would not hold elected officials to a lesser standard of conduct than non-elected officials, but would simply recognize the fundamentally different circumstances which govern the conduct of these two classes of officials. As the *Dozier* Court recognized, non-elected officials have no legitimate reason to request money from persons over whom they exercise some official power; it therefore is not unreasonable to presume that solicitation of such payments constitutes a *per se* coercive use of their office. Elected officials, by contrast, have an unquestioned right to solicit money in order to finance their campaigns. The question of when these solicitations cross the "fine line" and become coercive misuse of the candidate's office is much more difficult than in the case of non-elected officials. The requirement of a *quid pro quo* provides an essential degree of definitiveness to this issue, by a rule of law rather than at the discretion of a prosecutor.

III.

PETITIONER'S CONVICTIONS MUST BE REVERSED DUE TO THE ERRONEOUS JURY INSTRUCTIONS AND THE ABSENCE OF PROOF THAT THE CAMPAIGN CONTRIBUTION RECEIVED BY HIM WAS COERCED OR REPRESENTED A *QUID PRO QUO*.

A. The Instructions

Even if the factors established by the Fourth Circuit in its opinion were sufficient to enable a jury to differentiate between extorted and non-extorted contributions, the jury was never given this guidance.

The jurors in this case were repeatedly instructed, and the government repeatedly argued, that they did not need to find either coercion or a *quid pro quo* in order to convict Mr. McCormick (J.A. 19, 21-22, 30-33). Instead, they were told that they could find him guilty of extortion, and of filing a false tax return by failing to declare the payment, if the money did not constitute a "voluntary" political contribution – and "voluntary" was repeatedly defined as being limited to one made "without expectation of *some benefit*" (J.A. 25, 30, 31).

Moreover the jury was instructed that:

> If the public official knows the motivation of the victim to make any payment focuses on the public official's office, and money is obtained by the public official which was not lawfully due and owing to him or the office he represented, *that is sufficient to satisfy the government's burden of showing a misuse of office and extortion under color of official right*. The mere voluntary payment of money, however, does not constitute extortion.

(J.A. 19, 31) (emphasis added). As the Court of Appeals for the Sixth Circuit observed in *United States v. Bibby*, *supra*, under this language "any political contribution could conceivably provide the basis for a Hobbs Act charge." Even the Fourth Circuit warned, in an earlier case, that this instruction could "prohibit a public official from personally soliciting a campaign contribution." *United States v. Barber*, 668 F.2d 778, 783 n.2. (4th Cir. 1982).

The jury was told flatly that no *quid pro quo* was required:

> A claim that a public official's actions would have been the same whether or not he received the alleged payments is, for this purpose, irrelevant and is no defense to the [extortion] charges . . .
>
> So it is not necessary that the government prove that the defendant committed or promised to commit a *quid pro quo*, that is, consideration in the nature of official action in return for the payment of the money not lawfully owed. Such a *quid pro quo* may, of course, be forthcoming in an extortion case or it may not. In either event it is not an essential element of the crime.

(J.A. 22, 32)

The instructions given the jury were flawed in a fundamental way: they failed to distinguish between a *quid pro quo* and a contribution arising from a legitimate sense of gratitude for past or future support, or to distinguish between an attempt to corruptly influence a public official through an illicit exchange and the legitimate attempts to influence generally, made by lobbyists and contributors on a daily basis.

The error infected – and was compounded by – instructions given on the tax charge, which also tied the legality of the contributions to *any* expectation of benefit on the part of the donor (J.A. 25, 30, 31).

B. The Evidence

There was no evidence in this case that the nine hundred dollar ($900) payment received by Robert McCormick on June 1, 1984 – in response to his request for a campaign contribution shortly before the primary election – was due to any coercion or constituted a *quid pro quo* for any official action by him. Indeed, the evidence was overwhelming that Mr. McCormick's support of the foreign medical graduates' legislation, which was desperately needed to ensure even minimally adequate medical care within his district, had been enthusiastic and unreserved for years prior to the contribution. The evidence also gives no basis from which any reasonable person – whether the alleged victims or the jurors – could have believed that his continuing support would be contingent upon a campaign contribution.

The testimony at trial demonstrates that the overriding motivation of the foreign doctors in making the contribution was the classic one in American politics: appreciation of the efforts of their foremost spokesman within the legislature, and a desire to ensure that he would be reelected. (Excerpts from this testimony are reprinted at Pet. App. 38-48).

The deficiency of the evidence with respect to the tax count is even clearer. The internal Revenue Service has long conceded that "[w]here a political gift is received by an individual or a political organization and it is *held or used* for the purposes intended, i.e., for *present or future expenses* of a political campaign or for some similar purpose, it is not taxable income to the recipient." Rev. Rul. 54-80, 1954-1, C.B. 11-12 (emphasis added) (*superseded by* Rev. Rul. 71-449, 1971-2, C.B. 77). Only if political funds are "diverted from the channel of campaign activities and used by a political candidate for any personal purpose"

do they become taxable income, and then only "for the year in which the funds are so diverted." Rev. Rul. 71-449, 1971-2 C.B. 77. A candidate may maintain "personal and exclusive control" of political funds he receives without incurring tax liability, so long as he does not actually *use* the funds for a personal, nonpolitical purpose. Rev. Rul. 74-23, 1973 C.B. 17.

Moreover, the applicable Revenue Procedure explicitly provides that campaign contributions need not be reported as income if they *"are used to reimburse the political candidate for out-of-pocket campaign expenses paid by him* during a current campaign, or, if he is not currently campaigning, during his last previous campaign." Rev. Proc. 68-19, 1968-1 C.B. 810 (emphasis added).

There was absolutely no evidence in this case that any money given by the Coalfield Health Care Association to Mr. McCormick was "diverted from the channel of campaign activities and used by a political candidate for any personal purpose" – in 1984 or any other year.[16] Indeed, the evidence compels the conclusion that any contributions received by Mr. McCormick were fully nontaxable throughout 1984.

The evidence presented during the government's own case in chief conclusively establishes that the June 1 payment(s) were made *"to reimburse the political candidate for*

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[16] Mr. McCormick's 1984 campaign finance reports showed that he had loaned his campaign three thousand dollars on May 21, 1984 [Gov. Ex. 15, p. 7]. Mr. McCormick's total reported expenditures for the 1984 election totaled $6,411.53 [Gov. Ex. 15, p. 18]. His reported contributions, excluding the loan from his personal funds, totaled $3,525.00, according to the government's evidence [Gov. Ex. 15, p. 15].

out-of-pocket campaign expenses paid by him during a current campaign", and therefore not taxable. Rev. Proc. 68-19, 1968-1 C.B. 810 (emphasis added). [Tr. 167-68, 209-10].

Accordingly, a properly instructed jury could not have found Petitioner guilty of the extortion or tax charges, under the evidence presented in this case, and he should have been granted a judgment of acquittal.[17]

CONCLUSION

For the reasons stated above, Petitioner asks this Court to reverse his conviction, ruling that, if the Hobbs Act applies at all to political fundraising, it does so only upon proof of coercion or an actual *quid pro quo*, and that the evidence in this case was insufficient to establish either element. In the alternative, Petitioner respectfully asks the Court to reverse the conviction and order his retrial before a properly instructed jury.

Respectfully submitted,

ROBERT L. MCCORMICK

*RUDOLPH L. DI TRAPANO
REBECCA A. BAITTY
DI TRAPANO & JACKSON
604 Virginia Street East
Charleston, WV 25301
(304) 342-0133

Counsel for Petitioner
*Counsel of Record

[17] The district court denied the defendant's motions for judgment of acquittal, made at the end of the government's case and at the end of all the evidence (Tr. 643-65, 1102-08).

APPENDIX

STATUTES INVOLVED

18 U.S.C. § 1951 ("The Hobbs Act")

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section –

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and

any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

26 U.S.C. § 7206(1)

§ 7206. Fraud and false statements

Any person who –

(1) Declaration under penalties of perjury. – Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . .

. . .

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

RESPONDENT'S

BRIEF

Supreme Court, U.S.
FILED
DEC 1
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1918

In the Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT L. MCCORMICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

RICHARD A. FRIEDMAN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner, an elected public official, was properly convicted of violating the Hobbs Act by wrongfully inducing the making of a personal payoff for the performance of his official duties.

2. Whether petitioner, who did not declare the payoff he received as income, was properly convicted of filing a false personal income tax return.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 896 F.2d 61.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1990. A petition for rehearing was denied on March 7, 1990. The petition for a writ of certiorari was filed on June 5, 1990, and was granted on October 1, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Hobbs Act, 18 U.S.C. 1951, provides as follows:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any

article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) the term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify, or affect section 17 of Title 15, sections 52,

101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

Section 7206 of the Internal Revenue Code, 26 U.S.C., provides in relevant part as follows:

Any person who—

(1) * * * Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter * * *

* * * * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 * * * or imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT

After a jury trial in the United States District Court for the Southern District of West Virginia, petitioner, a state legislator, was convicted of extortion under color of official right, in violation of the Hobbs Act, 18 U.S.C. 1951; and of filing a false income tax return, in violation of 26 U.S.C. 7206(1). He was sentenced to three years' probation, fined $50,000, and ordered to pay restitution of $900 and prosecution costs of $1,647.50. The court of appeals affirmed.

1. In 1984, petitioner was a member of the West Virginia House of Delegates. He represented an economically depressed coal mining region that had long suffered from a shortage of medical personnel. To help alleviate the problem, West Virginia legislation had for some time allowed foreign medical school graduates who had not met

the State's medical licensing requirements to practice medicine under temporary permits while studying to pass the licensing examinations. Tr. 119-129, 377-378. Approximately 20 to 30 temporary-permit doctors had repeatedly failed the examinations but were able to continue practicing medicine while studying to take the examinations again. Tr. 610. The legislature passed a bill in 1980 that required the temporary-permit program to terminate in 1982. In 1981, that deadline was postponed until 1984. Tr. 122, 163, 378-379, 553.

a. Petitioner had been a long-time supporter of the temporary-permit system. Tr. 152, 228, 341. In 1983, lobbyist John Vandergrift called petitioner and said that he was interested in speaking to the temporary-permit doctors to see whether they would hire him to work on their behalf. Petitioner gave Vandergrift the name and telephone number of Dr. Ernesto Manuel, who had acted as a spokesman for the doctors. Tr. 151-152. A number of temporary-permit doctors, including Dr. Manuel, subsequently met with Vandergrift, hired him as their lobbyist, and at Vandergrift's suggestion formed the "Coalfield Health Care Association." Dr. Manuel became the president of the Association. Tr. 151-154, 157, 293-294.

During the 1984 West Virginia legislative session, petitioner sponsored legislation urged by the Association that extended the temporary-permit system for another year. Tr. 163-167. On March 10, 1984, the last day of the 1984 legislative session, Vandergrift, who was staying at a Charleston hotel, learned that petitioner had incurred a $766.34 bill at the hotel. Vandergrift paid the bill using Dr. Manuel's credit card. When Vandergrift later told petitioner that he had taken care of the bill, petitioner did not ask why. Tr. 1034-1036; C.A. App. 1125. Then, shortly after the close of the 1984 legislative session, petitioner agreed at Vandergrift's request to sponsor new legislation, to be introduced during the 1985 session, that would grant permanent medical licenses to the temporary-permit doctors. Tr. 165-167.

Vandergrift testified that late in May of 1984, shortly before the primary election, he had a telephone conversation with petitioner. In that conversation, Vandergrift stated, petitioner "expressed to me that his campaign was rather expensive, the election was coming up, and that he had put out a couple of thousand dollars out of his pocket and he hadn't heard anything from the foreign physicians and he wanted to know what I was going to do about it." Tr. 167-168. According to Vandergrift, petitioner was "very upset" and "unfriendly," and the tone of his voice was "very rough." Tr. 168, 282. Vandergrift told petitioner he would get in touch with Dr. Manuel and "see what I could do." Tr. 168.

Vandergrift then "relayed the conversation to Dr. Manuel." Tr. 169. Because petitioner "had mentioned he had to put out cash," Vandergrift testified, "I decided to go ahead and replace it in kind." Tr. 210. A day or two later, on June 1, 1984, Dr. Manuel cashed a $1,200 Association check and gave the proceeds to Vandergrift. Under his agreement with Dr. Manuel, Vandergrift kept $300 of the money and placed the rest, in the form of nine $100 bills, in an envelope to deliver to petitioner. Tr. 170-171, 306-308. Vandergrift then personally delivered the envelope containing the $900 to petitioner at his office at McCormick's Department Store in Logan, West Virginia. Petitioner's receipt of the $900 provided the basis for the Hobbs Act count on which he was convicted.

Vandergrift told petitioner there would be more money later that day. Petitioner said he would not be in his office that afternoon, but that if Vandergrift had more money he should give it to petitioner's grandnephew. Tr. 171-172. Later that day, Vandergrift received a $4,000 Association

check payable to him from Dr. Manuel, with the understanding that Vandergrift would keep $2,000 and the other $2,000 would be delivered to petitioner. Tr. 309, 354. That same day, Vandergrift cashed the $4,000 check and put $2,000 of it in $100 bills in an envelope. Accompanied by another Association member, Conrad Cabauatan, whose wife was a temporary-permit doctor, Vandergrift delivered the envelope to petitioner's grandnephew, who later gave it to petitioner. Tr. 176-178. The government's evidence showed that Dr. Manuel delivered three more cash payments from the doctors to petitioner: $800 on November 1, 1984; $600 on December 19, 1984; and $950 on May 15, 1985. Tr. 318-326.[1]

Neither the doctors nor petitioner treated the $900 June 1 payment, or any of the other cash payments, as a campaign contribution. Petitioner did not report the payments on his campaign books or in his required campaign financing filings. C.A. App. 1102-1114 (petitioner's campaign financial statements). Nor did he report it on his federal tax return for 1984. C.A. App. 1083-1095 (tax return). The Association kept a record of its payments to petitioner, but the Association's records did not identify those payments as campaign contributions; indeed, the Association used a code to disguise the fact that petitioner was the recipient. C.A. App. 1068, 1070 (photocopies of the five

[1] On each occasion on which the Association gave petitioner a cash payment, Dr. Manuel wrote an Association check with a coded notation indicating that the check was for petitioner. The check would then be cashed, and the cash would be placed in an envelope to be given to petitioner. Tr. 318-326. Dr. Manuel testified that the last three payments were for petitioner to distribute to other politicians, Tr. 323-324, 328-329, but there was no evidence that petitioner gave the money to anyone else, see Tr. 1167-1168.

relevant Association checks), 1076, 1078, 1080 (Association records).[2]

b. Dr. Manuel testified that he gave petitioner the cash payments to "express[ ] our thanks for what he has been doing." Tr. 320. Dr. Jamie Gosien, who was present when the $600 payment was made on December 19, 1984, understood that the cash payment was made "for the bill," Tr. 566, and "in return for [petitioner's] efforts," Tr. 582. Conrad Cabauatan testified that petitioner was given "the money in order to further the cause of the Coalfield Health Care Association * * * to secure a permanent license for those temporary licensed doctors." Tr. 893. Vandergrift stated that he advised the doctors to give petitioner the money because he "wouldn't take the risk of not giving it to him." Tr. 281.

The evidence showed that petitioner did, in fact, aid the temporary-permit doctors. At Dr. Manuel's request, petitioner appeared at a November 12, 1984, hearing of the West Virginia Board of Medicine to argue the temporary-permit doctors' cause and to appeal to the Board not to oppose legislation favorable to the temporary-permit doctors. Tr. 321-322, 387-388. The legislature reconvened in January 1985, and in February petitioner sponsored the favorable licensing legislation, H.B. 1431. Tr. 180-183, 325-326. Petitioner spoke at length in favor of the bill, which passed the House of Delegates and the Senate and became law on May 2, 1985. Tr. 183-184, 325; C.A. App. 1022-1067 (transcript of petitioner's remarks during debate on H.B. 1431). Two weeks after the bill was enacted, peti-

[2] The evidence included petitioner's campaign financial statements, signed and sworn to by petitioner, which contained a notice to candidates that contributions of more than $50 from one contributor in cash, rather than by check or money order, were improper and that all contributions, regardless of the amount, had to be reported. C.A. App. 1102, 1106, 1110, 1111.

tioner received the last of the series of cash payments from Dr. Manuel. Tr. 325-331.

In spite of the enactment of the licensing bill, seven of the temporary-permit doctors, including Dr. Manuel, Dr. Gosien, and Conrad Cabauatan's wife, were denied licenses by the Medical Licensing Board because they failed to meet even the liberal licensing requirements of the new law. Tr. 118-122, 184-185, 331-332, 602-604, 612-617. Vandergrift contacted petitioner and said that petitioner would have to make an appearance at the next Board meeting. Vandergrift told petitioner that "in order to get the board to change [its] mind and back up on the decision, he would have to intimidate the hell out of them." Tr. 185. On July 8, 1985, petitioner appeared at the hearing and made a presentation that included thinly veiled threats of legislative action adverse to the interests of the Board. Tr. 186-187, 412-418, 591-592. Petitioner assured the Board that "if I had a personal interest where I was going to have some gain out of this thing, I would not expect you-all to believe a word I've said or even to let me try to sway you in reconsidering your action." Tr. 502. As a result of the hearing, five of the seven doctors, including Dr. Manuel, Dr. Gosien, and Conrad Cabauatan's wife, obtained permanent licenses. Tr. 403-404, 593.

The following year, Vandergrift asked petitioner whether another politician should solicit funds from the formerly unlicensed physicians. According to Vandergrift, petitioner responded by saying that "the doctors had taken good care of him and the debt was paid and everyone else should basically not be asking them for any more political contributions." Tr. 189.

2. In September 1988, a federal grand jury returned an indictment charging that petitioner "obtain[ed] property in the form of cash payments * * * not due either him or his office, directly or indirectly, from foreign doctors holding

temporary permits, with their consent, induced under the color of official right." J.A. 13. In Counts 1 through 5, the indictment charged each of the five payments to petitioner as separate Hobbs Act violations. Count 6 charged petitioner with filing a false income tax return for 1984 because he had failed to report the 1984 payments as personal income. J.A. 14-15.

a. At trial, the government's theory of prosecution, as set forth in its opening statement and closing arguments, was that the payments were personal payoffs that the doctors had made to ensure petitioner's continued support of legislation favorable to them. Tr. 106, 112, 115, 1113, 1129. The initial theory of the defense, as set forth in defense counsel's opening statement, was that petitioner had never received any payments. Defense counsel claimed that the evidence "will militate against any possible inference that [petitioner] asked for, induced, or received any money from these doctors." Tr. 6.[1] Counsel further told the jury that petitioner "needs 5 or 6 hundred dollars or 4,000 dollars like he would need the Hong Kong flu. He doesn't need that money, we will show you, and didn't ask for it and didn't receive it." Tr. 7.

During trial, the defense sought to impeach Vandergrift's testimony by suggesting he had never delivered any money to petitioner, but instead had pocketed it himself with the intention of claiming it as a lobbying expense for the Association. Tr. 253, 255; see Tr. 304. In this connection, defense counsel first suggested that petitioner had never asked Vandergrift for money. If petitioner had needed a campaign contribution from the doctors, counsel suggested, petitioner would have called

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[1] Because the defense opening statement was transcribed out of the usual order (Tr. 116), it is included at Tr. 2-13 (and may also be found at C.A. App. 74-86).

them directly. Defense counsel asked Vandergrift why petitioner "would need you to intercede with a group that he had connected you with?" Tr. 234. In the same vein, defense counsel later sought to establish that Dr. Manuel had no way of knowing whether Vandergrift gave petitioner the $900 payment of June 1, 1985. Tr. 351. The defense called Conrad Cabauatan, who testified that he did not recall making any payment with Vandergrift or ever having met petitioner's grandnephew. Tr. 884-886. The defense also called petitioner's grandnephew, David McCormick, who denied ever receiving anything from Vandergrift. Tr. 1014-1015. In addition, the defense sought to develop evidence respecting petitioner's substantial net worth in support of its claim that petitioner had no motive to take any money. Tr. 535-544, 937.

That line of defense was weakened substantially when Dr. Manuel testified that he personally gave petitioner cash on three occasions. By the time defense counsel made his closing argument, the theory of the defense had shifted entirely. In his closing argument, defense counsel did not contest petitioner's receipt of the money, but claimed that the money was given and received as campaign contributions. As such, he argued, the payments could not violate the Hobbs act unless they were coerced or were made in exchange for a specific *quid pro quo*. Tr. 1130-1157. In rebuttal argument, the government reiterated its theory that petitioner had "receive[d] cash payments for doing his job, that's the crime that he is charged with." Tr. 1161; see also Tr. 1170. The government noted the abrupt change in the defense strategy, Tr. 1164, and argued that the evidence refuted the claim that the payments were made or received as campaign contributions, Tr. 1164-1170.

b. Both in the initial jury instructions, J.A. 16-22, and in the instructions given after the jury sought further guidance, J.A. 27-34, the district court comprehensively

instructed the jury on the elements of a Hobbs Act violation. The court instructed that in order to convict, the jury had to find that petitioner "induced a cash payment from foreign doctors, as alleged in each count," that petitioner "did so knowingly and willfully by extortion," and that in doing so he "affected or attempted to affect interstate commerce." J.A. 17, 28.

The statute defines "extortion" as "the obtaining of property from another, with his consent, induced * * * under color of official right," 18 U.S.C. 1951(b)(2), and the court so instructed the jury, J.A. 29; see J.A. 17. The court went on to explain the terms "inducement" and "under color of official right" in detail, and made clear that petitioner could not be convicted for receiving campaign contributions.

With respect to "inducement," the court instructed that "inducement can be in the form of a demand, or in a more subtle form such as custom or expectation such as might have been communicated by the nature of the defendant's prior conduct in his office, if any." J.A. 30; see J.A. 18. The jury was told that it could "take into account all the surrounding circumstances, including any words spoken or actions of the defendant," in determining whether petitioner had induced the payments. J.A. 29; see J.A. 18.

The court defined "under color of official right" to mean "the obtaining of money by a public official when the money obtained was not lawfully due and owing to him or his office." J.A. 30; see J.A. 18-19. The jury was further instructed: "If the public official knows the motivation of the victim to make any payment focuses on the public official's office, and money is obtained by the public official which was not lawfully due and owing to him or the office he represented, or which he was not otherwise lawfully entitled to receive, that is sufficient to satisfy the government's burden of showing a misuse of

office and extortion under color of official right." J.A. 31; see J.A. 19. The court added that "[a] claim that a public official's actions would have been the same whether or not he received the alleged payment is * * * irrelevant and * * * it is not necessary that the government prove that the defendant committed or promised to commit a quid pro quo." J.A. 32; see J.A. 21-22.

The court also instructed the jury that the alleged Hobbs Act violation is a "specific intent" crime, which requires that "the government must prove beyond a reasonable doubt that the defendant knowingly did an act which the law forbids, purposely intending to violate the law." Tr. 1191. The jury was instructed that "the specific intent requirement permeates every element of the offense, and is to be applied by you with respect to each count independently and separately."[4] Tr. 1192.

With respect to the defense theory that the payments were campaign contributions, not personal payoffs, the court instructed that "extortion does not occur where one who is a public official receives a legitimate gift or a voluntary political contribution even though the political contribution may have been made in cash in violation of local law." J.A. 30. The court further explained that petitioner could not be convicted simply for soliciting and accepting campaign contributions:

> It is not illegal, in and of itself, for an elected legislator to solicit or accept campaign contributions on behalf of himself or other legislators from individuals who have a special interest in pending legislation. * * *
>
> Many public officials in this country receive political contributions from individuals who, the official knows, are motivated by a general gratitude toward him because of his position on certain issues important to them, or even in the hope that the goodwill generated by such contributions will make the official more receptive to their cause.
>
> The mere solicitation or receipt of such political contributions is not of itself illegal.

J.A. 33; see J.A. 20-21. The court summarized this instruction by stating: "It would not be illegal, in and of itself, for Mr. McCormick to solicit or accept political contributions from foreign doctors who would benefit from this legislation." J.A. 33-34.

In the instructions with respect to the tax fraud offense, the court reiterated the requirement that the jury find that the cash payments were not received by petitioner as campaign contributions. The court first instructed the jury that "[w]here a political gift is received by an individual or a political organization and it is held or used for present or future expenses of a political campaign or for similar purposes, it is not taxable income to the recipient." J.A. 37. The court then made clear that petitioner could not be convicted of tax fraud if he had used the money for his campaign or even to reimburse himself for campaign expenditures. The court instructed the jury that the payments would constitute nontaxable political contributions if they had been "utilized for generally recognized campaign expenses, regardless of when such expenses were incurred," or "used to reimburse the political candidate for out-of-pocket campaign expenses paid by him during a current campaign, or, if he is not currently campaigning, during his last previous campaign." J.A. 37. Furthermore,

[4] However, the jury was instructed that it need not find specific intent respecting the effect of petitioner's actions on interstate commerce. J.A. 22, 32. That instruction was correct. See, *e.g.*, *United States* v. *Daley*, 564 F.2d 645, 649 (2d Cir. 1977), cert. denied, 435 U.S. 933 (1978).

the court made clear that the mere violation of a local campaign finance law did not give rise to liability for tax fraud: "In determining whether a particular payment represents a nontaxable political contribution, it does not matter whether or not the payment may have violated some state election law, although the fact that the payment is found to have violated some local election law may be taken into account for such value as it may have, if any, on the issue of intent." J.A. 37-38.

The jury convicted petitioner on the income tax charge and on the Hobbs Act charge involving the initial June 1, 1984, payment of $900. It failed to reach a verdict on the other four Hobbs Act counts.

3. The court of appeals affirmed. Pet. App. 1-22. It concluded that the jury instructions respecting when a personal payoff to a public official violates the Hobbs Act were correct. *Id.* at 9-10. The court then recognized that "[t]his case revolves primarily around the question of whether the money [petitioner] received was the result of extortion or only an illegal campaign contribution. * * * If the money was a voluntary campaign contribution, then [petitioner] is guilty only of violating state election laws." *Id.* at 11.

The court of appeals explained that "when an official does not intend a payment to be a campaign contribution, a jury should be allowed to infer from the circumstances surrounding the payment that it is in fact a payoff violating the Hobbs Act." Pet. App. 18. In this case, the court noted, petitioner knew that "his continued support was essential for [the temporary-permit] doctors to receive a permanent license," and in light of that knowledge, told their lobbyist that he had not 'heard from' the doctors." *Id.* at 19. Although petitioner, Vandergrift, and Dr. Manuel "all knew that cash campaign contributions greater than fifty dollars were illegal in West Virginia," the

doctors delivered "one hundred dollar bills placed in sealed envelopes * * * to [petitioner] personally at his office." *Ibid.* The court held that the "evidence supports the conclusion that the money was never intended by any of the parties to be a campaign contribution." *Id.* at 20. Accordingly, it affirmed the Hobbs Act conviction. *Ibid.*

Petitioner's only defense to the tax fraud charge was that the money was a contribution to his reelection campaign. Because the court of appeals concluded that the jury's contrary finding was supported by the evidence, the court affirmed petitioner's conviction on that count. Pet. App. 20-22.

SUMMARY OF ARGUMENT

The jury in this case found that petitioner accepted a personal payoff, not a campaign contribution, from the temporary-permit doctors. That pivotal finding provides the basis for affirmance of petitioner's conviction both under the Hobbs Act and the federal tax laws. In light of that finding, it is not necessary for this Court to address the difficult question of when the solicitation or acceptance of a campaign contribution constitutes extortion under color of official right.

I. The Hobbs Act prohibits a public official from inducing a payoff for doing his job. The common law prohibition against extortion "under color or official right" long prohibited such acts, and in enacting the Hobbs Act Congress adopted the conventional common law definition of extortion. Congress borrowed most directly from New York's extortion statute, which broadly defined extortion under color of official right to include receipt by a public official of compensation (other than his salary) for his official service. That is what the jury found occurred here.

A. Petitioner argues that extortion under color of official right should be narrowly limited to cases in which an

official pretends that he has the right to a fee. This proposed limitation is contrary to the common law origins of the Hobbs Act, the unanimous construction given the Hobbs Act by the courts of appeals, and this Court's construction of similar language in other statutes. Moreover, the unprecedented narrowing of the statute that petitioner proposes would convert the crime of extortion under color of official right into what amounts to a false pretenses offense.

B. Petitioner also argues that the Hobbs Act does not prohibit the inducement of campaign contributions in the absence of proof of a threat or a promise of a specific *quid pro quo*. We agree with that general statement of the law. Under West Virginia law, as under state and federal law generally, campaign contributions are lawful if they are not coerced or made as part of an explicit agreement by the public official to confer some benefit on the contributor. The solicitation of a campaign contribution therefore is ordinarily not "wrongful" within the meaning of the Hobbs Act, which prohibits the obtaining of funds only by "wrongful" means.

Outside the protected area of campaign financing, however, different principles apply. The Hobbs Act reaches the inducement of a personal payoff when the public official knows that the payment is made on account of his office, since the inducement and making of personal payoffs to public officials is universally condemned as "wrongful." As the court of appeals held, the facts adduced at trial show that petitioner intended to obtain what he received—a cash payoff, not a campaign contribution. And the instructions made it abundantly clear that the jury did not convict petitioner for soliciting a campaign contribution. Thus, even though petitioner never explicitly told the doctors that his support for their attempt to obtain permanent licenses was contingent on their

making a payoff to him, it was sufficient that he induced the payoff knowing that the doctors were likely to pay him in order to secure, retain, and reward his support for their cause.

II. Petitioner argues that his tax fraud conviction stands or falls with the Hobbs Act count. That is not necessarily so. Even if the Court accepts one of petitioner's legal arguments and reverses his Hobbs Act conviction, that would not affect the correctness of the jury's conclusion that petitioner obtained a $900 payment that was not a campaign contribution and that he failed to report it as income. Only if this Court accepts petitioner's factual contention that he was convicted for receiving a campaign contribution—a contention that was rejected by the jury and the court of appeals—should his tax fraud conviction be reversed.

ARGUMENT

I. PETITIONER VIOLATED THE HOBBS ACT BY INDUCING A PERSONAL PAYOFF UNDER COLOR OF OFFICIAL RIGHT

Petitioner has briefed this case as if it were established that the payments the doctors made to him were campaign contributions rather than personal payoffs.[5] The jury, however, rejected the "campaign contributions" defense and instead determined that petitioner was personally paid off for his efforts on behalf of the doctors. In light of the instructions given by the court, the jury's verdict makes it very clear that petitioner was not convicted for receiving campaign contributions.

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[5] Each of the argument headings in petitioner's brief contends that his convictions for receiving "campaign contributions" must be reversed.

The evidence at trial fully supported the jury's conclusion that petitioner received a payoff; in view of petitioner's mid-trial switch of theories, it is not surprising that the jury regarded the benign characterization of the cash payments as "campaign contributions" to be a transparent effort to give an appearance of legitimacy to payments that were actually personal payoffs. Because the jury was properly instructed and permissibly found that the payment for which petitioner was convicted was not a campaign contribution, much of petitioner's argument in this Court is based on an erroneous premise. For the same reason, in light of the jury's finding, it is unnecessary for this Court to address the question whether and in what manner the Hobbs Act applies to bona fide campaign contributions.

A. The Hobbs Act Prohibits An Elected Official From Inducing A Personal Payoff In Return For Doing His Job

The Hobbs Act prohibits extortion, which it defines as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b)(2). Petitioner was charged and convicted of extortion under color of official right. That offense has a long history, dating back to 1275. Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 U.C.L.A. L. Rev. 815, 841 (1988). In fact, while "extortion" today evokes the image of racketeering and the use of threats of force by private individuals, at common law extortion was a crime that could be committed only by a public official. 2 W. LaFave & A. Scott, *Substantive Criminal Law* 458 (1986); *United States* v. *Harding*, 563 F.2d 299, 304 (6th Cir. 1977), cert. denied, 434 U.S. 1062 (1978).

The federal crime of extorting property "under color of official right" was first enacted as part of Section 2(b) of the Anti-Racketeering Act of 1934, Ch. 569, § 2(b), 48 Stat. 979.[6] In 1946, the pertinent language was incorporated, unchanged, into the Hobbs Act, Ch. 537, 60 Stat. 420. See *United States* v. *Enmons*, 410 U.S. 396, 401-408 (1973). This Court recognized in *Enmons* that the Hobbs act "incorporate[d] New York's conventional definition of extortion—'the obtaining of property from another . . . with his consent, induced by a wrongful use of force or fear, or under color of official right.' N.Y. Penal Law § 850 (1909)." 410 U.S. at 406 n.16.[7]

In the 1909 New York Penal Law, which was in effect when the Anti-Racketeering Act and the Hobbs Act were enacted, extortion under color of official right included the receipt by a "public officer" of "compensation for his official service" where no compensation is due. N.Y. Penal Law § 855 (Ingram 1909); Lindgren, *supra*, 35 U.C.L.A. L. Rev. at 898.[8] Thus, extortion under color of

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[6] Section 2(b) of the Anti-Racketeering Act of 1934 proscribed "[o]btain[ing] the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right."

[7] In support of that point, the Court cited the following portions of the legislative history of the Hobbs Act: 91 Cong. Rec. 11,842 (1945), (remarks of Rep. Walter); *id.* at 11,843 (remarks of Rep. Michener); *id.* at 11,900 (remarks of Rep. Hancock); *ibid.* (remarks of Rep. Hobbs); *id.* at 11,906 (remarks of Rep. Robison).

[8] New York Penal Law § 855 (Ingram 1909) provided:

> A public officer who asks, or receives, or agrees to receive a fee or other compensation for his official service:
>
> 1. In excess of the fee or compensation allowed to him by statute therefor; or
>
> 2. Where no fee or compensation is allowed to him by statute therefor;
>
> Commits extortion • • •

official right was understood in New York (and therefore presumably by the Congress that adopted New York law as the basis for the Hobbs Act) to apply to the inducement of payoffs by an elected official in return for his services. In this respect, the New York law, and derivatively the Hobbs Act, was fully consistent with the long common law history of punishing public officials for extortion when they received—whether by coercion, false pretenses, or bribery—fees to which they were not entitled. See Lindgren, *supra*, 35 U.C.L.A. L. Rev. at 837-882.[9]

Petitioner acknowledges that "the common law offense of extortion * * * included some forms of bribery." Br. 26. He nevertheless contends that the proscription of extortion under color of official right is limited to cases in which an official pretends that he has a right to the money he obtains. Br. 24, 27.[10]

The adoption of this contention would lead to a radical narrowing of the statute's reach. Under petitioner's theory, a public official would commit the crime of extortion under color of official right only if he claimed that a fee was required by law when in fact no such fee was due. Under this theory, a public official would not commit extortion under color of official right when demanding a payoff in exchange for performing his job, even if there

[9] As this Court has noted, "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette* v. *United States*, 342 U.S. 246, 263 (1952); see *Taylor* v. *United States*, 110 S. Ct. 2143, 2155 (1990).

[10] Petitioner did not make this argument in his petition for a writ of certiorari or in the courts below.

was an explicit demand for payment or a clear promise of a *quid pro quo*, unless he falsely represented that the payment was legally required.

Petitioner's sweeping contention is inconsistent with the meaning of the crime of extortion under color of official right at common law and under the New York extortion statute. There is no indication that the common law courts limited the concept of extortion to cases in which public officials falsely represented that a fee was legally required.[11] And the New York legislature, following the conventional approach, defined extortion broadly to include various acts by which a public official improperly obtained "compensation for his official service." N.Y. Penal Law § 855 (Ingram 1909); see note 8, *supra*. That definition was not in any way limited to cases of misrepresentation or fraud by the public official, but clearly encompassed cases in which the public official simply demanded compensation as a condition of doing his job.[12]

[11] Professor Lindgren notes dozens of English cases in which officials were convicted of extortion for behavior that did not involve the collection of a fee under the pretense that it was due. For example, in a series of cases decided in 1298, officials were convicted of extortion for accepting payments in lieu of jury duty from potential jurors who did not want to serve. See 35 U.C.L.A. L. Rev. at 855. And in the 1700s, an official committed extortion by accepting 42 shillings in return for not taking a defendant arrested for assault to prison. *Id.* at 857. In addition, the New York courts affirmed the extortion conviction of a forensic specialist who offered to generate unfavorable evidence against the driver in an automobile accident in return for a payoff. *People* v. *Hansen*, 241 N.Y. 532, 150 N.E. 542, 211 N.Y.S.2d 861 (1925), aff'g 211 A.D. 861 (1924). Obviously, there was no pretense that the fee was owed to the forensic specialist.

[12] In his dissenting opinion in *United States* v. *Cerilli*, 603 F.2d 415, 434 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980), from which petitioner quotes at length (Br. 26-27), Judge Aldisert failed to note

The limitation suggested by petitioner is also contrary to the uniform construction of the Hobbs Act by the courts of appeals. The issue of the proper construction of the "color of official right" clause of the Hobbs Act has been litigated extensively in the courts of appeals, and every circuit that has addressed the issue has rejected the view that extortion under color of official right covers only the collection of fees under the pretense that the fees are owed.[13]

Furthermore, petitioner's construction of the phrase "under color of official right" conflicts sharply with this Court's construction of similar language in other familiar statutory contexts, where the requirement that action be "under color of state law" has been interpreted to include "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *United States* v. *Classic*, 313 U.S. 299, 326 (1941) (interpreting the predecessor to 18 U.S.C. 242); *Monroe* v. *Pape*, 365 U.S. 167, 172 (1961) (interpreting 42 U.S.C. 1983). As the courts of appeals

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New York's entire statutory definition of extortion and thus interpreted the New York statute as being narrower than it was.

[13] See, *e.g.*, *United States* v. *Hathaway*, 534 F.2d 386, 392-394 (1st Cir.), cert. denied, 429 U.S. 819 (1976); *United States* v. *Trotta*, 525 F.2d 1096, 1099-1100 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976); *United States* v. *Kenny*, 462 F.2d 1205, 1228-1229 (3d Cir.), cert. denied, 409 U.S. 914 (1972); *United States* v. *Price*, 507 F.2d 1349, 1350 (4th Cir. 1974); *United States* v. *Williams*, 621 F.2d 123, 125-126 (5th Cir. 1980), cert. denied, 450 U.S. 919 (1981); *United States* v. *Harding*, 563 F.2d at 307; *United States* v. *Braasch*, 505 F.2d 139, 151 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975); *United States* v. *Brown*, 540 F.2d 364, 372-373 (8th Cir. 1976); *United States* v. *McClelland*, 731 F.2d 1438, 1439 (9th Cir. 1984), cert. denied, 472 U.S. 1010 (1985); *United States* v. *Hall*, 536 F.2d 313, 320-321 (10th Cir.), cert. denied, 429 U.S. 919 (1976); *United States* v. *Swift*, 732 F.2d 878, 879-880 (11th Cir. 1984), cert. denied, 469 U.S. 1158 (1985).

have held, exactly the same interpretation is appropriate for the phrase "under color of official right": it applies to the misuse of official power to obtain things of value, even if there is no pretense of entitlement on the part of the official.

Petitioner's theory, if adopted, would produce a striking anomaly in the federal law of extortion. An official would commit extortion under color of official right if the victim paid an excessive fee believing it was due, but not if the victim was flatly told that he must make a payoff in order to obtain official action. If that were the law, "extortion under color of official right" would have little in common with the ordinary concept of extortion, but instead would be converted into a type of fraud or false pretenses offense. Extortion is ordinarily understood to mean the act of obtaining money by consent, where the consent is induced by a threat of some kind of injury in the future. See W. LaFave & A. Scott, *supra*, § 8.12. Under petitioner's view of the crime of extortion under color of official right, however, the victim's consent would be the product not of a threat, but of a misrepresentation. As Professor Lindgren has pointed out, "[l]imiting official extortion only to cases of false pretenses and excluding coercion would not fit almost anyone's notion of the correct scope of official extortion." Lindgren, 35 U.C.L.A. L. Rev. at 895.

In support of his contention, petitioner relies primarily on the absence of legislative history indicating any intention to reach other sorts of corruption by local officials. Br. 28. The scope of a statute, however, is not limited to the specific examples of its anticipated application that are mentioned in the legislative history. *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988).[14] The language

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[14] Petitioner begins his argument by stating that the "under color of official right" clause is hardly mentioned in the legislative history of

chosen by Congress—"extortion * * * under color of official right"—indicates that Congress intended to adopt a broad prohibition against extortionate behavior by public officials,[15] and its selection of the language of the New York statute indicates an intention to adopt the conventional meaning of the offense, which New York law had adopted.

Petitioner also relies heavily on a 1943 statement that Representative Hobbs made on the floor of the House, in which he said that " '[c]olor of official right' means absence of right but pretended assertion of right." Br. 20 (quoting 89 Cong. Rec. 3228 (1943)) (emphasis omitted). Representative Hobbs' statement, however, was made in response to the concern expressed by another congressman that the Act "would apply to an initiation fee in a labor union." *Ibid.* (statement of Rep. Day). In context, it appears that Representative Hobbs was simply assuring the other congressman that the "color of official right" lan-

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the Hobbs Act, which focused on labor racketeering. Br. 14-15. There is, of course, no merit to petitioner's suggestion that despite its broad language the Act should be limited to labor racketeering simply because the legislative debates focused on that topic.

[15] Relying on *United States* v. *Bass*, 404 U.S. 336, 349-350 (1971), petitioner notes (Br. 29-31) that a "clear statement" is necessary before this Court will conclude that Congress has made a federal crime of conduct traditionally regulated by the States. The textual statement "under color of official right" satisfies that requirement, particularly when coupled with the broad jurisdictional reach of the statute. See *United States* v. *Culbert*, 435 U.S. 371, 373 (1978) ("[T]he statutory language sweeps within it all persons who have 'in any way or degree . . . affect[ed] commerce . . . by robbery or extortion.' 18 U.S.C. § 1951(a) (1976 ed.). These words do not lend themselves to restrictive interpretation; as we have recognized, they 'manifest[ ] a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence.' *Stirone* v. *United States*, 361 U.S. 212, 215 (1960).").

guage in the Act applied only to public officials or to persons claiming to be public officials, and did not apply to private persons such as union officers. His statement does not justify limiting the reach of the Act so that it is inapplicable to cases in which a public official demands a personal payoff to do his job.[16]

B. Petitioner Was Convicted Of Obtaining A Personal Payoff, Not A Campaign Contribution

The remainder of petitioner's argument in this Court, like the whole of his argument in the court of appeals, assumes that the Hobbs Act applies to public officials other than in situations where an official falsely pretends that a fee is due. Petitioner's further contention is that the Act does not prohibit the solicitation of "campaign contributions, absent proof of a *quid pro quo*." Br. 35 (argument heading). The flaw in petitioner's argument, however, is

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[16] Petitioner also suggests (Br. 33 n.13) that proof of "coercion"—by which he apparently means evidence of "force, violence, or fear"—should be required in prosecutions for extortion under color of official right. As the courts of appeals have unanimously agreed, however, the Hobbs Act is phrased in the disjunctive, and proscribes extortion by *either* "wrongful use of actual or threatened force, violence, or fear" *or* "under color of official right." In a dissenting opinion in *United States* v. *Cerilli*, 603 F.2d at 429, on which petitioner relies, Judge Aldisert "concede[d] that a purely semantic approach to the statutory language can substantiate a decision that no duress need be proved," but thought that a literal interpretation would have prevailed only "[i]n an earlier era of our jurisprudential tradition." The Criminal Division of the Department of Justice once erroneously interpreted the statute in the same manner. See United States Dep't of Justice, *Labor Racketeering Manual* 18-19 (1971). We believe that interpreting the disjunctive language in the statute to provide independent grounds for liability is entirely sensible and cannot be dismissed simply by the pejorative use of the term "literal interpretation" and the suggestion that such an approach to statutory construction is outmoded.

that he was not convicted for receiving a campaign contribution *i.e.*, funds that are intended to be used to defray campaign expenses. The jury concluded that he received a personal payoff, not a campaign contribution, and the evidence supports that conclusion. In that setting, it is not necessary for the government to show that the payment was the product of either an explicit threat or a *quid pro quo*. Instead, where an official is shown to have received a personal payoff, it is sufficient that the evidence show that he induced the payoff and that the payoff was made on account of his official position, both of which were proved in this case.

The evidence that petitioner was seeking a payoff rather than a bona fide campaign contribution is compelling. Instead of contacting Dr. Manuel directly, petitioner spoke to Vandergrift, who had previously used the Association's funds to pay a large hotel bill owed by petitioner. Tr. 1034-1036. Going through Vandergrift was a curious way to seek a campaign contribution, since it was petitioner who had introduced Vandergrift to Dr. Manuel. Because Vandergrift's role as intermediary between the doctors and petitioner related exclusively to the temporary-permit legislation, making a solicitation through Vandergrift was especially likely to send the message that a payment was expected for petitioner's support of the doctors' cause.

The manner in which petitioner conveyed his demand for money and handled the $900 June 1, 1985, payment after it was made gave further indication that he was seeking a payoff, albeit under the guise of requesting a campaign contribution. Speaking in a rough tone, Tr. 282, petitioner told Vandergrift that "he had put a couple of thousand dollars out of his pocket" for his campaign, Tr. 168. Vandergrift deduced that he should 'replace it in kind," Tr. 210, even though the evidence indicated that all of the parties to the transaction knew that cash campaign

contributions of more than $50 were illegal, see Pet. App. 19. When Vandergrift delivered the nine $100 bills to petitioner, petitioner did not act surprised and he did not ask for a check instead. None of the parties reported the transaction as a campaign contribution. C.A. App. 1076-1080, 1102-1114.[17]

The timing of the payments is especially revealing. The payments continued to be made long after the election was over, and the last payment was made only two weeks after the favorable legislation was enacted with petitioner's support. The timing strongly suggests that the payments were tied to the legislation, not the campaign.

Finally, after one of the payments had been made, petitioner made the highly revealing remark to Vandergrift that "the doctors had taken good care of him and the debt was paid." Tr. 189. Thus, the evidence supports the conclusion that all the parties to the payment—petitioner, Vandergrift, and the doctors—regarded the $900 as a payoff, not a campaign contribution, and that the references to the campaign were merely window-dressing to give the payoff the appearance of legitimacy.[18]

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[17] As the district court instructed the jury, J.A. 37-38, the fact that a public official violated some state campaign financing law does not convert his solicitation of campaign contributions into the solicitation of a payoff. The violation of a state law governing campaign financing may be relevant to determining the public official's intent, but it does not ipso facto render his acceptance of funds a violation of the Hobbs Act. The court of appeals correctly noted that "[i]f the money was a voluntary campaign contribution, then [petitioner] is guilty only of violating state election laws." Pet. App. 11.

[18] Petitioner contends (Br. 4) that "the government's own theory was that the payments were intended to reimburse Mr. McCormick for expenses he had incurred in his reelection campaign." That is not so. The government's theory is and has been that petitioner "receive[d] cash payments for doing his job." Tr. 1161. Although petitioner mentioned that he had paid some money out of his own pocket in connec-

The jury was properly instructed that it could not convict petitioner if it concluded that the $900 payment was a campaign contribution. The jury was told, for example, that "[m]any public officials in this country receive political contributions from individuals who, the official knows, are motivated by a general gratitude toward him because of his position on certain issues important to them, or even in the hope that the goodwill generated by such contributions will make the official more receptive to their cause," and that "[t]he mere solicitation or receipt of such political contributions is not of itself illegal." J.A. 33. The instructions on the tax fraud count provided that petitioner could not be convicted if he had used the money "for generally recognized campaign expenses" or even if the money had been used "to reimburse the political candidate for out-of-pocket campaign expenses." J.A. 37. The jury concluded that although petitioner mentioned during his conversation with Vandergrift that he had incurred campaign expenses, he was seeking a personal payoff.

Petitioner states, Br. 49 n.16, that his campaign finance reports show that he contributed more than $3,000 of his own money to his 1984 campaign. But the evidence at trial showed that petitioner received more than $5,000 from the doctors, well in excess of the amount of his own funds he claimed to have spent on his campaign. Yet even if the amount paid by the doctors had been less than the amount petitioner spent, that would not render the doctors' payment a campaign contribution as long as neither side treated them as such. Any other conclusion would allow any elected official who contributed to his campaign to

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tion with his campaign when he demanded money from the doctors, we think that Vandergrift correctly ascertained that petitioner did not want a campaign contribution, but instead wanted a cash payoff.

justify a payoff simply by calling it a reimbursement for personal campaign expenditures.[19]

If this case had involved a campaign contribution rather than a personal payoff, it would have been necessary for the government to prove that the contribution was obtained by a threat to take unfavorable action or a specific promise to take favorable action, *i.e.*, a *quid pro quo*. See, *e.g.*, *United States* v. *Biaggi*, 909 F.2d 662, 695 (2d Cir. 1990) (an elected official can be convicted under the Hobbs Act for extorting a campaign contribution only if the official "directly * * * linked the contribution to specific official action to be taken by the official"); *United States* v. *Haimowitz*, 725 F.2d 1561, 1573 (11th Cir.), cert. denied, 469 U.S. 1072 (1984); *United States* v. *Dozier*, 672 F.2d 531, 537 (5th Cir.), cert. denied, 459 U.S. 943 (1982); *United States* v. *Cerilli*, 603 F.2d 415, 418-421 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980). The Department of Justice has adopted that position as a policy matter,

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[19] There is no merit to petitioner's contention, Br. 44, that the factors mentioned by the court of appeals as bearing on the question whether a payment was a campaign contribution or a personal payoff are unduly vague. Petitioner misunderstands the purpose of those factors. Those factors are not designed to determine "whether a political contribution violates the Hobbs Act," Pet. Br. 42, but to distinguish campaign contributions from "payments [that] were never intended to be legitimate campaign contributions," Pet. App. 17. The factors listed by the court of appeals to make that determination include such common-sense considerations as whether the payment was made in cash or by check, whether it was delivered to the official personally, and whether the payor or the official treated the payment as a campaign contribution. *Ibid.* Where, as here, a payment is delivered in cash directly to the elected official who does not treat the payment as a contribution to his election campaign, there is nothing unfair or surprising about concluding that the payment was not a campaign contribution, and that the official's inducement of the payment was therefore a wrongful use of his public office.

stating that "campaign contributions will not be authorized as the subject of a Hobbs Act prosecution unless they can be proven to have been given in return for the performance of or abstaining from an official act; otherwise any campaign contribution might constitute a violation." Department of Justice, *United States Attorneys Manual* (P-H) § 9-85A.306, at 9-1938.134 (Supp. 1988-2).

The statutory basis for this special treatment of campaign contributions is the requirement that the inducement of a payment under the Hobbs Act be "wrongful," 18 U.S.C. 1951(b)(2), a requirement that applies to each of the listed means of obtaining property. See *United States* v. *Enmons*, 410 U.S. at 399 & n.2; *United States* v. *French*, 628 F.2d 1069, 1074 (8th Cir.) ("It is the wrongful purpose of the taking under color of official right that makes appellee's conduct extortion under the Hobbs Act."), cert. denied, 449 U.S. 956 (1980). It is lawful in West Virginia, as in every other State and under federal law, for a public official to solicit campaign contributions, see W. Va. Code §§ 3-8-1 through 3-8-13 (1990); *Buckley* v. *Valeo*, 424 U.S. 1, 21 (1976), *United States* v. *Brewster*, 506 F.2d 62, 67 (D.C. Cir. 1974), but it is universally unlawful for such contributions to be induced by threats or promises relating to official action. See W. Va. Code § 3-8-12(e) (1990). A campaign contribution is therefore "wrongful," and thus subject to prosecution under the Hobbs Act, only where the connection between the contribution and the candidate's official acts is clearly conditional. A candidate is, of course, free to point out to potential campaign contributors that he favors their position on an important issue and to advise them that a contribution to his campaign is therefore in their best interest. But a candidate cannot sell his vote by stating explicitly that his

position on a particular issue will depend on whether he receives a suitable campaign contribution.[20]

Where, as in this case, no campaign contribution is at issue, it is not necessary for the government to prove that the public official offered a *quid pro quo* in exchange for payment made to him. That is because the demand for and receipt of a personal payoff in return for performing official services is always wrong, so that the concern for distinguishing between legitimate campaigning and vote-selling does not apply. In *United States* v. *Dozier*, 672 F.2d 531, 537 (5th Cir. 1982), the court recognized that "[d]emands for money by an unelected official may constitute extortion *per se*." With respect to personal payoffs, an elected official is no different from an unelected official, for in that setting the act of receiving payment for an official act is invariably wrongful.[21]

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[20] Accordingly, having concluded that the evidence did not sufficiently show that an elected official had coupled a demand for a campaign contribution with a promise to perform an official act, the court in *United States* v. *Haimowitz*, *supra*, 725 F.2d at 1573, correctly reversed a Hobbs Act conviction.

[21] The dissenting judge in *United States* v. *Cerilli*, 603 F.2d at 437, asked if a governor "would be guilty of a Hobbs Act violation if he now were to appear at a fundraising dinner and solicit contributions for his political party" from businessmen?" The answer is no, because political contributions are different from personal payoffs. But it would be a violation for an elected official in such a situation to solicit personal payoffs rather than political contributions or to threaten to change position on an important issue in the absence of a sufficient contribution.

Of course, if a particular State made it lawful for an elected official to accept campaign contributions in exchange for the performance of official duties, a Hobbs Act prosecution could not be based on such conduct, because it would not be "wrongful." But we are aware of no State in which such conduct is lawful, just as we are aware of no State

Contrary to petitioner's contention, no error was committed because the jury was told that the evidence did not have to show that petitioner "committed or promised to commit a quid pro quo," J.A. 22, 32, in order to convict. Petitioner suggests that the jury merely had to find that he received the money from the doctors, but the instructions showed that the jury also had to conclude (1) that he "induced" the payoff, J.A. 18, 29; (2) that the doctors paid petitioner "with the expectation that [petitioner] would extend to [the doctors] some benefit or refrain from some harmful action, and [petitioner] accepted the money knowing it was being transferred to him with that expectation," J.A. 17-18; and (3) that the money was not paid as a "voluntary political contribution," J.A. 30. In context, it is clear that the instruction stating that the jury did not have to find that petitioner promised a *quid pro quo* simply meant that if the jury found that the payments to petitioner were personal payoffs, rather than bona fide campaign contributions, it was unnecessary for the government to prove that petitioner expressly conditioned his support for the doctors on the receipt of a payment from them.

In sum, what is required in a case involving a personal payoff is what the district court instructed the jury it had to find in order to convict petitioner—proof that the payoff was induced rather than volunteered, J.A. 30; see J.A. 18, and proof that the official knew "the motivation of the victim to make any payment focuses on the public official's

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in which it is lawful to use the threat of violence to obtain property; in the case of personal payoffs to public officials, as in the case of extortion by threat of violence, the element of wrongfulness will invariably be satisfied.

office," J.A. 31; see J.A. 19.[22] As we have noted, the evidence in this case showed that petitioner demanded money from the doctors, and it was clear that petitioner did so because he knew the doctors wanted to secure, retain, and reward his official support for their efforts to obtain permanent medical licenses.

The evidence further showed that petitioner "delivered" for the temporary-permit doctors—he asked the West Virginia Board of Medicine not to oppose legislation favorable to the Association, Tr. 321-322, 387-388, he sponsored the legislation, Tr. 180-183, 325-326, and he badgered the Board to ensure that some of the doctors

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[22] Although the inducement in this case was quite explicit (petitioner said "he hadn't heard from the foreign physicians," and petitioner "wanted to know what [Vandergrift] was going to do about it," Tr. 167-168), it is not necessary for the government to show an explicit inducement to satisfy the requirements of the Hobbs Act. Even in the absence of an express request for payment, an inference of unlawful inducement can be drawn from factors such as the repeated acceptance of substantial benefits, see *United States* v. *Biaggi*, 909 F.2d at 669, or the acceptance of payments by a public official in a setting in which it is understood that payments are expected, *United States* v. *Egan*, 860 F.2d 904, 907 (9th Cir. 1988). A number of courts of appeals have held that the proof of inducement is sufficient as long as the public official simply accepts something of value, knowing that it has been conferred because of his office. See, *e.g.*, *United States* v. *Evans*, 910 F.2d 790, 796-797 (11th Cir. 1990); *United States* v. *Garner*, 837 F.2d 1404, 1421-1422 (7th Cir.), cert. denied, 486 U.S. 1035 (1988); *United States* v. *Spitler*, 800 F.2d 1267, 1274-1275 (4th Cir. 1986); *United States* v. *Jannotti*, 673 F.2d 578, 594-596 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982); *United States* v. *Butler*, 618 F.2d 411, 417-418 (6th Cir.), cert. denied, 447 U.S. 927 (1980), and cases cited therein. It is not necessary in this case for the Court to address the question whether an inducement based on the public official's office rather than his conduct is sufficient to satisfy the statute, since the inducement in this case came directly from petitioner and was explicit.

who could not qualify even under the new law obtained licenses, Tr. 186-187, 412-418, 592. Thus, petitioner performed services of the sort the doctors expected when they made their payments to him, which supports the jury's conclusion that the parties regarded the funds as a payoff for services rather than a contribution to a campaign. Because petitioner demanded a personal payoff, knowing that the doctors were likely to accede to the demand because of his office, he was properly convicted of extortion under color of official right.

II. PETITIONER'S TAX FRAUD CONVICTION IS VALID EVEN IF HIS HOBBS ACT CONVICTION IS OVERTURNED

The court of appeals affirmed petitioner's tax fraud conviction because, in affirming his extortion conviction, it had rejected his contention that he merely received a campaign contribution from the doctors. Pet. App. 20-21. As the court of appeals recognized, if petitioner's Hobbs Act conviction is affirmed, it necessarily follows that his tax fraud conviction must also be affirmed. If this Court reverses the conviction on the Hobbs Act count, however, it does not follow that the Court must also reverse the conviction on the tax fraud count.

Under petitioner's broad argument, extortion under color of official right prohibits an official only from collecting a fee that he pretends is due. Acceptance of that far-reaching view would require that petitioner's Hobbs Act conviction be reversed. But even if extortion under color of official right does not cover the inducement of a personal payoff, the federal tax laws nevertheless require that officials report any income received through such schemes. Since it is now undisputed that petitioner received $900 from the doctors and did not report it as income, he committed tax fraud, and nothing about petitioner's broad argument undermines that conclusion.

Under petitioner's narrower contention, he should not have been convicted of a Hobbs Act violation because the government failed to prove a sufficiently explicit *quid pro quo* agreement by petitioner to perform official acts in exchange for the payment. But if petitioner's Hobbs Act conviction is reversed on that ground, that would not change the fact that he received the payment. Moreover, the jury concluded that petitioner received it as a personal payoff, since the jury was instructed that if the payment was "held or used for present or future expenses of a political campaign or for similar purposes, it is not taxable income to the recipient," J.A. 37.[23] Accordingly, petitioner was required to report the $900 payment as income whether or not it was received as part of a *quid pro quo* arrangement prohibited by the Hobbs Act.

Only if this Court concludes that the $900 was received as a campaign contribution would it follow that his tax fraud conviction should be reversed. As the jury was instructed, if the payment "constituted voluntary political contributions, it was not taxable income and Mr. McCormick's failure to report it on his tax return was not illegal." J.A. 36. But there is no basis for the Court to reject the jury's factual finding that the money was a personal payoff—a finding which the court of appeals held was supported by the evidence, Pet. App. 20—and overturn petitioner's tax fraud conviction.

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[23] The jury was also told that if the money was "used to reimburse the candidate for out-of-pocket campaign expenses paid by him" then it was not taxable. J.A. 37.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

RICHARD A. FRIEDMAN
Attorney

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REPLY

BRIEF

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In The

Supreme Court of the United States

October Term, 1990

ROBERT L. McCORMICK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF OF PETITIONER

*Rudolph L. Di Trapano
Rebecca A. Baitty

Di Trapano & Jackson
604 Virginia Street East
Charleston, WV 25301
(304) 342-0133

Counsel for Petitioner
*Counsel of Record

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ARGUMENT

The Government's argument purports to give protection to non-coercive campaign fundraising activities, by conceding that they do not fall within the scope of the Hobbs Act unless they constitute a "specific *quid pro quo*." Brief for United States at 16, 29-30. But the Government immediately strips away that protection by arguing that funds given to a candidate, in response to his request for assistance in defraying campaign expenses, somehow lose their character as campaign contributions if they constitute something much less than a *quid pro quo*: a "personal payoff."

According to the Government's definition, a "personal payoff" includes virtually any payment made to an official "on account of his official position," so long as he knows that "the motivation for the payment focuses on his office" (Brief of United States at 16, 26, 32-33). To establish a "personal payoff," the Government must prove merely that the payment was motivated because of the recipient's past support, or anticipated future support, of the donor's cause. *Id.* It is difficult to conceive of any campaign contribution which would not meet this definition.

The protection suggested by the government is illusory. Any contribution which was made "on account of" the recipient's office, or his position on a particular issue, would constitute a "personal payoff"; thus, according to the Government's reasoning, it would not be a campaign contribution in the first place. The supposed standard for conviction – proof of a specific, identifiable *quid pro quo* – need not be met, so long as a much less rigorous standard – evidence that the contribution was made because of the official's position on particular issues – were established.

Petitioner urges the Court to reject the Government's argument, which is fundamentally flawed as a matter of law, fact and logic.

I. THE JUNE 1, 1984 PAYMENT WAS A CAMPAIGN CONTRIBUTION.

The most significant, and erroneous, factual assertion in the Government's brief is its denial that the June 1, 1984 payment to Mr. McCormick (or any other payment he allegedly received) was a campaign contribution.

Petitioner's contention that any payments to him constituted campaign fundraising did not "evolve" as a mid-trial defense, as the Government asserts in its brief. Both his Requested Instructions submitted prior to the commencement of trial, C.A. App. 33-73, and his Opening Statement[1], Tr. 7-8, presented the defense theory that – if the testimony of the Government's witnesses were to be believed[2] – the payments made to Mr. McCormick constituted political contributions.

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[1] "Bob McCormick was working for this bill way before these doctors contend that they gave him – and here is what they are going to say, the best their evidence is going to be is to say they went and gave him a political contribution. A political contribution they gave him. He is working on the bill. They will admit he never asked for anything. They are going to testify that they gave him a political contribution" (Tr. 7).

[2] The defense certainly was entitled to challenge the testimony of Vandergrift, whose credibility was questionable, particularly regarding the second payment he claimed to have delivered to Petitioner's grandnephew on June 1. The jury's conviction of Mr. McCormick for the first June 1 contribution, and their failure to reach a verdict based on the second payment allegedly made on that same day, shows either serious doubts as to Vandergrift's truthfulness or serious confusion as to the distinction between extortion and lawful campaign solicitation.

More importantly, the Government's own evidence uniformly characterized the allegedly extorted payment as a campaign contribution. This is not a case in which conflicting evidence was presented regarding the purpose of the payment. *All of the testimony* at trial established that the June 1, 1984 payment was "intended to be used to defray campaign expenses" which had been incurred by Mr. McCormick and thus, by the Government's own definition, Brief for the United States at 26, constituted a campaign contribution.

The testimony of John Vandergrift, the Government's chief witness, constitutes the only direct evidence concerning the purpose of the initial June 1, 1984 payment – the only payment underlying Mr. McCormick's extortion conviction. That testimony conclusively establishes that the payment was considered both by Mr. McCormick and by Mr. Vandergrift, as well as by the doctors who furnished the money, as fundraising for Mr. McCormick's reelection campaign.

Mr. Vandergrift testified that the payment was requested by Mr. McCormick just prior to the primary election of 1984, as a campaign contribution:

> He expressed to me that his campaign was rather expensive, the election was coming up, and that he had put out a couple of thousand dollars out of his pocket and he hadn't heard anything from the foreign physicians and he wanted to know what I was going to do about it (Tr. 167-68).

Mr. Vandergrift stated that he telephoned Dr. Manuel soon thereafter, relayed the conversation to him, and "stressed to him I thought it was very important that we get some money *to help Bob in his campaign*" (Tr. 169).

Vandergrift delivered the payment to Mr. McCormick stating "I hope this will help" (Tr. 172).

The money was paid, Vandergrift said, because "we were facing a very important legislative session, and I wanted to be in a position to *help Bob with his campaign* and to strengthen the ties of influence that this would generate" (Tr. 178).

Vandergrift repeatedly testified that "the thrust of the conversation was that he wanted [Vandergrift] to go to the doctors to get *a campaign contribution*" (Tr. 234):

- "the phone conversation had to do . . . with *a political contribution*" (Tr. 280);
- Vandergrift "read the tone of his voice that he wanted *a campaign contribution*, that he needed it" (Tr. 282);
- "he had mentioned that he had just put 2,000 dollars out *for campaign expenses* in cash, and I thought it would be appropriate at least to replace that and some more if we could" (Tr. 209);
- Vandergrift "gave this to him *for his campaign* in Logan county" (Tr. 248);
- McCormick said he needed the money *"[f]or his campaign"* (Tr. 282);
- Vandergrift told Manuel he wanted to give McCormick $2,000 *"for his campaign"* (Tr. 249);
- Cabauatan accompanied Vandergrift on the second June 1 delivery, "to make sure that the *campaign money* was delivered to Bob" (Tr. 250);
- Vandergrift did not think it unusual that McCormick would ask him for a contribution, rather than approach the doctors directly, because "it's not an uncommon

thing *when candidates are raising money*"[3] (Tr. 234).

Even when Mr. Vandergrift mentioned to Mr. McCormick another candidate's desire to ask the doctors for campaign contributions during the 1986 primary election, McCormick responded that candidates "should basically not be asking them for any more *political contributions*" (Tr. 189).

There simply is no evidence in the record of this case to rebut Mr. Vandergrift's testimony that the June 1 payment was requested, and paid, as a campaign contribution.

Despite this overwhelming evidence as to its nature, the Government contends that the payment cannot be characterized as a political contribution because (1) it was made in cash, in contravention of state law; (2) it was not described as a campaign contribution on either Mr. McCormick's campaign finance reports or the doctors' checkbooks;[4] and (3) it was given because of Mr. McCormick's past support, and his anticipated future support,

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[3] The government suggests some sinister connotation in Mr. McCormick's request for a contribution through the doctors' lobbyist, rather than directly to Dr. Manuel. However, as Vandergrift stated, *supra*, an approach to a lobbyist is not uncommon. Moreover, Vandergrift testified that the phone call in which the contribution was discussed was initiated by him, not by McCormick (Tr. 168, 233).

[4] It was undisputed that Vandergrift himself, without any consultation with Mr. McCormick, had decided to make the June 1 payment in cash (Tr. 210). And there was no evidence whatsoever that Mr. McCormick knew anything about the Association's recordkeeping methods, for these or any other expenditures.

of the doctors' legislation. Following the logic of the Government's argument, it would be impossible ever to prove a violation of state campaign laws: the fact that a contribution was made in cash and not reported proves, according to the Government's theory, that it was not a "campaign contribution" at all.

By the same reasoning, compensation received by an individual would not be income if he failed to report it on his income tax returns. John Vandergrift, the Government's chief witness at trial, testified that he had devised a scheme whereby his employers (including the Coalfield Health Care Association) did not report any compensation they paid to him, and he did not file an income tax return reporting any of this income (Tr. 212-14). Certainly the Government would not contend that Vandergrift did not receive any taxable income, simply because neither the foreign doctors nor Vandergrift treated it as such in their records and reports.

Every accepted definition of a "political contribution" is based not on its form[5] but on its essential purpose: to influence the nomination, election or defeat of a candidate or otherwise influence the outcome of an election. *E.g.*, W. Va. Code § 3-8-5c; 2 U.S.C. § 431(e)(1). A payment made four days before an election, in order to defray or reimburse the campaign expenses of a candidate, is a campaign contribution, regardless of how it is treated in the records and reports of the parties. It may have been coerced, it may represent a *quid pro quo* for

[5] In fact, cash contributions were a common, and perfectly legal, method of campaign fundraising in West Virginia until the enactment of W.Va. Code § 3-8-5d in 1976, and some states still permit unreported cash contributions.

official conduct, and it may violate every known state election law, but that does not change its essential nature as a campaign contribution.

In summary, notwithstanding the Government's inability to accept what its own evidence conclusively shows, the June 1, 1984 payment which formed the basis for Petitioner's extortion conviction, as well as any other payments which might support the tax charge,[6] were political contributions entitled to special protection from unwarranted prosecution under the Hobbs Act – protection which was not afforded in this case.

II. THE PAYMENTS WERE NEITHER IMPROPER COMPENSATION FOR OFFICIAL CONDUCT NOR PART OF A *QUID PRO QUO*.

The Government repeatedly characterizes the foreign doctors' payments to Mr. McCormick as "personal payoffs," and defines that term broadly as any payment made "on account of his official position" (Brief of United States at 16, 26, 32-33). Certainly the contributions were made "on account of" Petitioner's position, to the same degree that all campaign contributions are so made.

[6] The second June 1 payment alleged in the indictment – if it was made at all – was simply a second installment of this campaign contribution. The other alleged payments, made directly by the doctors, were indisputably intended as campaign contributions to *other* members of the legislature facing reelection challenges in the general election (Tr. 315-16, 323-24, 328-29, 359-61, 364). The final payment by the doctors, which was the only one at all distant in time from an election, was made in 1985 and thus was not a basis for Petitioner's conviction on either the tax or the extortion count.

However, the Government's suggestion that the contributions represented improper compensation to Mr. McCormick for his official acts,[7] or that Mr. McCormick conditioned his support for the licensing legislation upon the receipt of contributions, is insupportable on this record.

Legislative leaders repeatedly testified at trial that, since his election to the legislature in 1980, Mr. McCormick had been one of the leaders in his community's effort to allow foreign physicians to continue practicing (Tr. 822-27, 905-07, 989-90, 993). Long before campaign contributions were even mentioned, he had sponsored legislation continuing their licensure, and had navigated the bill through the committee he chaired, to passage by the full house (Tr. 163-67).

Mr. Vandergrift himself readily conceded he had initially approached Mr. McCormick because he "had found out that he was very helpful with the foreign doctors and concerned about their caus " (Tr. 151-52), and because he

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[7] In arguing that the evidence shows a pattern of payoffs to Mr. McCormick, the Government also relies on evidence that, on March 10, 1984, the final day of the legislative session, Mr. Vandergrift had paid hotel charges incurred by Petitioner totaling approximately $700. However, Mr. Vandergrift testified that Mr. McCormick never requested this payment and was not even informed of it until some unspecified time afterward (Tr. 757-58, 753, 1036).

Moreover, Vandergrift testified that he had paid the hotel charges not just of Mr. McCormick, but of *any member of the legislature* who was staying at his hotel, in the course of running up a lobbying bill of $160,000 (Tr. 744, 748-49). His payment of legislator's expenses was indiscriminate; their position on the licensing legislation was "totally immaterial . . . if they were a legislator, I was . . . available to pay their tab or whatever" (Tr. 237).

knew that Mr. McCormick "had been working for them for several years, was committed to the idea" (Pet. App. 45, Tr. 230). For years before Vandergrift came into contact with him, Mr. McCormick "was working enthusiastically" for the licensing legislation; Vandergrift "didn't have to do anything to sustain the activity and the fervor and the enthusiasm of Bob McCormick for this bill." (Pet. App. 45-46, Tr. 228-29).

More importantly, the individuals who actually provided the funds – the temporarily licensed doctors and their families – knew that McCormick had been committed to the legislation long before receiving any contributions from them (Pet. App. 39, Tr. 570, 575-76), and knew that the contributions would not affect his future actions.[8]

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[8] The Government's brief portrays Mr. McCormick's contacts with the state Board of Medicine as some sort of *quid pro quo* for the doctors' financial support. However, an examination of the evidence reveals that his actions did not constitute improper conduct, let alone evidence of corruption. *See generally*, Rosenberg and Maskell, *Congressional Intervention in the Administrative Process: Legal and Ethical Considerations*, Congressional Research Service (1990).

Just days before the foreign physicians' temporary licenses were to expire, the Board refused to grant permanent licenses to seven of these physicians, including all three practicing at Logan General Hospital. This action placed Mr. McCormick's district in immediate danger of losing critical health care, including all emergency medical services (Tr. 345-46, 687-88, 737-40).

With respect to the three Logan doctors and two others, the Board had relied solely on their failure to meet an additional licensure requirement, which members of the legislature and their attorney believed was simply inapplicable (Tr. 402, 833-35, 997-99). Board members admitted that they resented the fact that "politicians" were setting licensing standards for

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Dr. Manuel felt assured of Mr. McCormick's continued support for the doctors' efforts, regardless of any contributions they might make, due to the critical health needs of their community (Pet. App. 38). He knew that Mr. McCormick was "dedicated to that. Then he promised that he will do the best thing that he can. Because his request is not only coming from one segment of society, but from all segments of the Logan County people, concerned citizens" (Pet. App. 39).

Dr. Manuel did not believe that "by giving him money, it would cause him to do anything any different than he already had been doing" (Pet. App. 40). The doctor categorically denied that Mr. McCormick had ever requested a personal payoff or "compensation" for his support:

> "[H]e had been working hard for us, you know. And let me tell you that *he had never asked or demanded anything for his work from me.* . . . Mr. McCormick put this bill into motion, help us, and never asked us for anything. There are some other – I've been in Logan since 1975, and *Mr. McCormick has never asked me for any personal payment*" (Pet. App. 38-40).

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doctors (Tr. 432-33, 627), and had decided to grant licenses under Mr. McCormick's bill only if they were convinced they "must" (Tr. 432-33).

Board members readily conceded that their action was contrary to the unmistakable intent of the legislature (Tr. 464-65, 503-05). The immediate response, not just from Mr. McCormick, but from the entire legislature and the governor's office, was outrage (Tr. 459-60, 503, 830-33, 996-99). Mr. McCormick's manner in his contacts with the Board was described uniformly as friendly, "low-key" and reasonable (Tr. 408, 459, 461-62, 598-600). The Board's decision to grant licenses to the five physicians was an accession to the obvious will of the legislature as a whole (Tr. 459-62, 624).

Dr. Jamie Goshien confirmed that Mr. McCormick had "never communicated to [him] or to any doctor in the Coalfield Health Care Association that he expected any donation or money from the doctors. . . . He never hinted . . . that as a delegate in the West Virginia legislature, that he expected a political contribution, money, or anything of . . . value" (Tr. 569). Dr. Goshien also agreed that the contributions were not intended to, and did not, influence McCormick's action (Tr. 576).

The Government's only other witness concerning the reasons behind the doctors' payments to Petitioner was Conrad Cabauatan, the husband of one of the temporarily licensed physicians. When asked whether the contribution to Mr. McCormick represented a "payment" for his work on their behalf, he responded "No, sir, definitely not" (Tr. 902).

In short, the evidence in this case provides no basis for a finding that Mr. McCormick's work for the foreign physicians was ever conditioned upon his receipt of money, or that their contributions represented illicit payoffs.[9]

[9] Indeed, it seems most unlikely that Mr. McCormick would have been prosecuted for extortion, or his conviction upheld, if only two facts of this case were different: (a) if the campaign contributions were made by check and (b) if they were reported on Petitioner's campaign financing reports. Under these circumstances, Mr. McCormick's receipt of contributions from the foreign physicians would appear to be – as it was in fact – no more corrupt than any candidate's receipt of contributions from persons with a special interest in pending legislation.

III. THE JURY INSTRUCTIONS PERMITTED CONVICTION FOR CONDUCT NOT WITHIN EITHER THE EXTORTION OR TAX STATUTES.

The Government concedes that proof of a *quid pro quo* would be required if the payments made to Mr. McCormick constitute campaign contributions. Brief for United States at 16, 29-30. However, the Government cannot deny that the jury in this case was instructed that proof of a *quid pro quo* was *not* required for a conviction (J.A. 22, 32-33). Moreover, the jury was told that they could convict Petitioner of extortion if the motivation of the doctors in making the contributions "focused" on his office, and the payments were "not lawfully due and owing to him" (J.A. 19, 31). Under this instruction, virtually all campaign contributions would constitute Hobbs Act violations, as the Sixth Circuit recognized in *United States v. Bibby*, 752 F.2d 1116 (6th Cir. 1985).

The Government attempts to solve its dilemma by simply asserting that the jury found that the payments were not campaign contributions. Brief for United States at 15-17, 26. However, there clearly is no way to determine whether the jury in fact made such a finding.

At the very least, the evidence at trial was sufficient to enable the jury to find that the June 1 payment to Mr. McCormick represented a political contribution. But the jury was not instructed that a *quid pro quo* was unnecessary *only if they first found that the payments were not campaign contributions*. They were simply told that a *quid pro quo* "is not an essential element" of extortion under official right (J.A. 22, 32-33).

Likewise, the jury was told that the "government's burden of showing a misuse of office and extortion under

color of official right" is satisfied whenever "the motivation of the victim to make *any* payment focuses on the public official's office, and money is obtained by the public official which was not lawfully due and owing to him" (J.A. 19). The jury was never told that this instruction was inapplicable if they believed that the payments in question were campaign contributions.

The Government's theory at the trial of this case was clear: the only campaign contributions insulated from Hobbs Act liability are those which are purely "altruistic . . . , simply motivated out of wanting to see this person elected *without any expectation of benefit*" (Tr. 1231). The Government also argued that a campaign contribution was legal only if it was "*unrelated* to the motivation created because of his office and because he's working on some law for him"[10] (Tr. 1225).

The Government's theory – that even if the payments made by the doctors were campaign contributions, they violated the Hobbs Act if the doctors expected any benefit to result or if they were motivated by the Petitioner's work on their behalf – was adopted in the instructions given the jury. At the Government's insistence, the court modified the key instructions on campaign contributions by incorporating the Government's narrow definition of a

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[10] When the jury requested clarification of the instructions defining extortion, the district court suggested telling them that "extortion does not occur when one who is a public official receives a legitimate gift or a voluntary political contribution even though the political contribution may have been made in cash in violation of local law." (Tr. 1228). The United States Attorney immediately objected, claiming that "that guts the Government's case" (Tr. 1228-29).

"voluntary" political contribution, one which is made "without expectation of benefit" (J.A. 30-31).

In its closing argument to the jury, the Government thoroughly blurred any distinction between campaign contributions protected from Hobbs Act prosecution, and other payments. The argument attempted to convince the jury that no proof of *quid pro quo* was required, even if the payments were campaign contributions:

> This was legislation that was important to the citizens of this state and there may have been many, many good reasons to support it. The defendant may have had many good reasons on his own to support it. He may have supported it if the money had never been paid. But that is not the issue here . . . And we don't have to prove that he would have or would not have supported it if the money hadn't been paid (Tr. 1128).
>
> It is the receipt of the money that is the crime. *We don't have to show that he gave some quid pro quo or threatened any action. Simply that when it was paid, the doctors paid it with an expectation of benefit.* And what was the benefit in this case? It's obvious. His continued support on the bill . . . *And whether or not it's a campaign contribution makes no difference* either if it was extorted under color of official right, if it was induced under color of official right (Tr. 1159-60).[11]

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[11] The Government concluded its argument with yet another recital of this refrain:

> Ladies and gentlemen, the citizens of West Virginia are entitled to have legislation considered on the merits and solely on the merits alone – nothing less, nothing more. We can't have legislators who may be basing their decisions on other factors. And *we don't have to prove that he did in this case. The fact that he*

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Regardless of whether a properly instructed jury could have found that the money received by Mr. McCormick on June 1, 1984 crossed the thin line dividing campaign contributions from extortion, this jury was never told where that boundary line should be drawn.

Finally, the Government argues that even if Petitioner's Hobbs Act conviction must be reversed, his tax fraud conviction can stand *unless "this Court concludes that the $900 was received as a campaign contribution."* Brief for United States at 35. As previously stated, the testimony in this case establishes overwhelmingly that the payment *was* received as a campaign contribution.

Even if the evidence of the payment's nature were less clear, the instructions given on the tax count, like the Hobbs Act instructions, improperly permitted conviction *for a campaign contribution* if the jury found that the payment was not "voluntary" in the sense that the contributor had some "expectation of benefit" (J.A. 24, 30, 36). Under the Internal Revenue Code, it is the purpose to which the contribution is put, rather than the contributor's expectation of benefit, which determines whether the payment is taxable. Rev. Rul. 71-449, 1971-2 C.B. 77; Rev. Proc. 68-19, 1968-1 C.B. 810.

In essence, the Government argues that the *quid pro quo* requirement for Hobbs Act prosecutions for campaign fundraising does not apply to the tax laws. If this were so, the tax fraud statute could simply replace the Hobbs

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> *received money taints him, compromises him* . . . Logan County deserves better than a legislator who accepts money from those persons, *cash moneys from those persons interested in legislation* (Tr. 1169-70).

Act as the vehicle for criminal prosecutions based on campaign fundraising under an impermissibly vague and broad standard. The same constitutional and policy concerns which require a narrow and carefully delineated standard for Hobbs Act prosecutions based on political contributions are equally applicable to prosecutions under the tax laws.

IV. THE HOBBS ACT WAS NOT INTENDED TO REGULATE THE TYPE OF CONDUCT ALLEGED IN THIS CASE.

The Government's brief suggests that virtually any payments wrongfully received by a public official, including campaign contributions made in violation of local election laws, may violate the Hobbs Act. However, the history of the statute demonstrates otherwise.

The Government relies heavily on a recently published historical analysis of the scope of common law extortion, Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. Rev. 815 (1988). However Lindgren, whose extensive research included much unpublished material, acknowledges that courts and legislatures at the time of the Hobbs Act's passage held a much less expansive view of the scope of extortion under color office.[12] *Id.* at 886-87.

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[12] The Government cites only one obscure case in support of the proposition that New York law, on which the Hobbs Act was based, extended beyond the unauthorized taking of *fees*. However, *People v. Hansen*, 241 N.Y. 532, 150 N.E. 542 (1925), *aff'g* 211 App. Div. 861 (1924), could hardly have been relied on by Congress, since neither of the reported opinions in the case

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This Court has repeatedly observed that, when a common law term is incorporated into a statute without definition, it should be interpreted in accordance with the contemporary understanding of its meaning at the time the statute was enacted, *e.g., Perrin v. United States*, 444 U.S. 37 (1979). Cases interpreting official right extortion near the time that the Hobbs Act and its predecessor were passed demonstrate a contemporary understanding which parallels Representative Hobb's definition – a "pretended assertion of right," 89 Cong. Rec. 3228-29 (1943).

The notion that "pretense" is fundamental to the offense of extortion under color of official right appears repeatedly in the cases decided near the time of the Anti-Racketeering Act. In *Commonwealth v. Channing*, 55 Pa. Super. 510 (1914), the court held that it was "absolutely essential" that the government prove "not only that the defendant was prohibited by statute or rule of public policy from taking the fees, but also that he took them by color of his office." The Pennsylvania court described three "judicially recognized definitions of color of office":

> "a pretense of official right to do an act, made by one who has not such right; the use of official authority as a pretext or cover for the commission of some corrupt or vicious act; an act wrongfully done by an officer under the pretended authority of his office." *Id.* at 516-17 (citations omitted).

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include any hint of the factual basis for the conviction. Moreover, the Government asserts, based on Lindgren's statement of the facts in the case, Lindgren, *supra*, at 901, that "[o]bviously, there was no pretense that the fee was owed to the forensic specialist." However the defendant, who worked for the sheriff, *id.*, was convicted of "taking unlawful fees" as well as extortion. 150 N.E. 542.

The Florida Supreme Court in 1939 also emphasized that a false claim of right[13] was a prerequisite to common law extortion:

> " 'If any public officer, in the *pretended* exercise of the duties of his office, illegally and from some improper motive takes from any person against his will any money or valuable thing which is not then due from that person, he is guilty of extortion' . . .
>
> " 'A taking under color of office is the essence of the offense. The money or thing received must have been *claimed or accepted in right* of office.' " *La Tour v. Stone*, 139 Fla. 681, 190 So. 704 at 707, 709 (1939) (emphasis added) (citation omitted).

As Representative Hobbs' remarks indicate, when the 92nd Congress reenacted the "color of official right" language in 1946, the term still was considered to require a claimed pretense of right.

In *Screws v. United States*, 325 U.S. 91 (1945), this Court held that, under the civil rights act, "[i]t is clear that *under 'color' of law means under 'pretense' of law.*" *Id.*,

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[13] The required element of pretense, according to English authorities cited by the Florida court, justified the punishment for extortion: "[I]t is more odious than robbery, for robbery is apparent, and always hath the countenance of vice, but extortion, being equally as great a vice as robbery, carries the mask of virtue, and is more difficult to be tried or discerned, and consequently more odious than robbery." *La Tour v. Stone*, 139 Fla. 681, 190 So. 704 at 708 (1939) (citations omitted).

This rationale explains the apparent anomaly, noted by the Government, in the failure of "official right" extortion to include coercive takings unaccompanied by any claim of right. Of course, coercive conduct by public officials, as well as by private individuals, are within the Hobbs Act's prohibition against the use of "actual or threatened force, violence or fear".

at 110 (emphasis added). State courts and commentators, construing the common law or extortion statutes similar to New York's Field Code, reached similar conclusions:

> " 'At common law, the money or other thing of value must be taken under color of office. That is, The service rendered, or to be rendered, Or pretended to have been rendered, must be *apparently, or pretended* to be, within official power or authority, and the money must be taken in such an apparent or claimed capacity.' " 1 Burdick, Law of Crime § 275, at 395 (*quoted in Finley v. State*, 84 Okla. Crim. 309, 181 P.2d 849 (1947)) (emphasis added).

As the Government contends, bribes were sometimes included within the scope of extortion at common law. But, at least according to the contemporary understanding at the time of the Hobbs Act, a pretense of right was still essential to the extortion offense:

> "In many cases of this nature the distinction between extortion under color of official right and requesting and receiving a bribe, by public officials, is very narrow; so narrow sometimes as to barely cast a shadow. In fact, while bribery and extortion are distinct offenses, the same facts may be the basis for the charge of either extortion or bribery. They are very closely allied; so closely allied that *if a pretense of official authority* to do the act for which a bribe is given, the taking of it is extortion as well as bribery." *Finley v. State*, 84 Okla. Crim. 309, 181 P.2d 849 (1947) (emphasis added).

The Government cites no history or authority which suggests that the Congress which enacted the Hobbs Act ever meant it to regulate state campaign practices, or even to punish ordinary payoffs of public officials, received without any claim of right. Indeed, the Government concedes that, for some twenty-five years after the Hobbs Act's passage, the Government itself "mistakenly"

believed that the statute required proof of coercion for *any* conviction. Brief for the United States at 25, n.16. Instead, the Government relies on a relatively recent series of decisions by Courts of Appeals, which uphold the Government's ever-expanding use of the Hobbs Act to police local corruption. However, these cases are notable for their almost total lack of analysis of the statute's history or intent.

The fact that later courts may have adopted a much broader reading sheds little, if any, light on the statute's true purpose and proper scope. *Cf., McNally v. United States*, 483 U.S. 350 (1987). The history of the Hobbs Act demonstrates that it was never intended to reach the conduct at issue in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

*Rudolph L. Di Trapano
Rebecca A. Baitty

Di Trapano & Jackson
604 Virginia Street East
Charleston, WV 25301
(304) 342-0133

Counsel for Petitioner
*Counsel of Record